APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 03/05/07]

No. 05-15467
D.C. No. CV-03-03542-VRW

GOOD NEWS EMPLOYEE ASSOCIATION; *et al.*,
Plaintiffs-Appellants,

v.

JOYCE M. HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & a Economic Development Agency; et al.,
Defendants-Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed MAR 5, 2007]

No. 05-15467
D.C. No. CV-03-03542-VRW

GOOD NEWS EMPLOYEE ASSOCIATION; REGINA REDERFORD; ROBIN CHRISTY,
Plaintiffs-Appellants,

v.

JOYCE M. HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland; ROBERT C. BOBB, in his individual and official capacities, as the City Manager of the City of Oakland,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted February 15, 2007
Stanford, California

MEMORANDUM *

Before: B. FLETCHER, CLIFTON, and IKUTA, *Circuit Judges*.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appellants challenge two decisions made by the district court. In the initial decision, the district court granted, in part, appellees' motion to dismiss several of the claims raised by appellants. Then, following discovery, the district court granted summary judgment to appellees on each of the remaining claims. We agree with the well-reasoned orders of the district court and affirm.

Appellants raise three arguments on appeal. First, they assert that the district court misapplied the law pertaining to workplace speech—particularly, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and *Pool v. VanRheen*, 297 F.3d 899 (9th Cir. 2002)—in granting summary judgment to appellees. Second, appellants argue that if the district court had applied *Pickering* correctly, it would not have dismissed five other causes of action lodged in their complaint. And third, appellants argue that the administrative instruction at issue in this appeal is unconstitutionally vague and overbroad.

Appellants' first argument lacks merit. To win on appeal, appellants must demonstrate that appellees' qualified immunity has been abrogated. Qualified immunity protects appellees unless the court determines that appellants "ha[ve] shown that the action complained of constituted a violation of [their] constitutional rights," "the violated right was clearly established, and . . . a reasonable public official could [not] have believed that the particular conduct at issue was lawful." *Butler v. Elle*, 281 F.3d 1014, 1021 (9th Cir. 2002) (citing *Sonada v. Cabrera*, 255 F.3d 1035, 1040 (9th Cir. 2001)). Here, appellants fail at the first stage of the inquiry.

Public employers are permitted to curtail employee speech as long as their "'legitimate administrative interests' outweigh the employee's interest in freedom of speech." *Pool*, 297 F.3d at 906 (quoting *Bauer v. Sampson*, 261 F.3d 775, 784 (9th Cir. 2001)). In this case, the only limit placed on appellants' speech was the removal of a single flyer from the wall. Although appellants did receive an oral warning for

posting the flyer, no adverse employment action was taken, and the warning alone is insufficient to tip the *Pickering* balance in appellants' favor. Appellants were also allowed to submit a new flyer, subject to certain editorial constraints. In light of the minimal interference with appellants' free speech rights, the district court appropriately described their speech interest as "vanishingly small." *Good News Employee Ass'n v. Hicks*, No. C-03-3542 VRW, 2005 WL 351743, at *9 (N.D. Cal. Feb. 14, 2005). Because the district court correctly held that appellees had a more substantial interest in maintaining the efficient operation of their office than appellants had in their speech, appellants cannot establish a viable free speech claim.

Even if appellants presented an arguably cognizable claim —which they did not—they would still need to show that the *Pickering* balancing test yielded a "clearly established" violation. The determination of "whether a public employee's speech is constitutionally protected turns on a context-intensive, case-by-case balancing analysis . . . [that] the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity. . . ." *Moran v. Washington*, 147 F.3d 839, 847 (9th Cir. 1998). Appellants fail to show such a 'clearly established' violation here.

Appellants' second argument must also fail. Although appellants argue that the district court's misapplication of *Pickering* caused it to dismiss five additional causes of action, the district court actually dismissed these counts on entirely separate, unrelated grounds. *See Good News Employee Ass'n v. Hicks*, No. C-03-3542 VRW, slip op. at 34-45 (N.D. Cal. Mar. 16, 2004). Appellants fail to address any of the actual grounds for dismissal, either directly or indirectly, and have provided no additional arguments that bear on their claims. We therefore deem appellants' argument waived. *See Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir.

1992), *cert denied*, 507 U.S. 1004 (1993) (holding that issues not "specifically and distinctly raised and argued" in opening briefs need not be considered by the court).

Appellants' third argument is also without merit. Appellants allege that Administrative Instruction 71 ("AI 71") is unconstitutionally vague and overbroad, but have provided little to support their claim. This court has recognized that "even when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001). The essential question before any reviewing court is whether individuals who want to obey the statute would have difficulty understanding it. *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 845 (9th Cir. 1976). AI 71 prohibits "discrimination and/or harassment based on sexual orientation." It then provides an entire paragraph of examples to illustrate the reach of these terms. Between the plain terms of the instruction and the illustrative examples, city employees should have little difficulty understanding the scope of the prohibition. To the extent that any vagueness exists, such vagueness is an inherent, irreducible part of any anti-discrimination ordinance and does not reach a "real and substantial" amount of speech. *See Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204, 1217 (9th Cir. 1996). AI 71 does not run afoul of the First Amendment, and the district court did not err in dismissing appellants' vagueness and overbreadth challenge.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C-03-3542 VRW

GOOD NEWS EMPLOYEE ASSOCIATION *et al*,
Plaintiffs,

v.

JOYCE M HICKS *et al*,
Defendants.

ORDER

Before the court is defendants' motion for summary judgment. Doc #40. For the reasons that follow, the court GRANTS defendants' motion, thus adjudicating plaintiffs' claims for retrospective relief. The court *sua sponte* dismisses plaintiff's claims for prospective relief for lack of jurisdiction.

I

Plaintiffs Regina Rederford ("Rederford") and Robin Christy ("Christy") bring suit pursuant to 42 USC § 1983 and other statutes for violations of various putative rights in the course of the removal of a flyer they had posted around their office in the Oakland Community and Economic Development Agency (CEDA). The flyer, which promoted their unincorporated association, the Good News Employee Association (GNEA), called on readers to "Preserve Our Workplace With Integrity," and explained that GNEA "is a forum for people of Faith to express their views on contemporary issues of the day. With respect for the Natural Family, Marriage and Family values." Melaugh Decl (Doc #43) Ex D. Plaintiffs contend in their complaint (Doc #1) that the removal of this

flyer violated their rights under the United States Constitution, the California Constitution and municipal law.

Named as defendants are Joyce Hicks ("Hicks"), who was a deputy executive director in CEDA, Robert Bobb ("Bobb"), who was Oakland's City Manager, and the City of Oakland (the "City") itself. Defendants filed a motion pursuant to FRCP 12(b)(6) to dismiss plaintiff's complaint for failure to state a claim (Doc #13) and a motion pursuant to FRCP 41(b) to dismiss the case for failure to prosecute (Doc #25). By order dated March 16, 2004, the court granted both motions in part. Doc #32. Remaining in the case is a claim against Hicks and Bobb, in both their individual and official capacities, for violation of plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution. Plaintiffs seek both retrospective and prospective relief. Defendants now move for summary judgment. Doc #40.

The facts are not in material dispute. GNEA's stated purposes are "[t]o celebrate our Faith and Liberties by preserving the integrity of the Natural Family, Marriage and Family values"; "[t]o provide a forum for people of faith to express their views on contemporary issues of the day"; and "[t]o oppose all views that seek to redefine the Natural Family and Marriage." Melaugh Decl (Doc #43) Ex D. In its "Statement of Faith," GNEA explains that "we believe the Natural Family is defined as a man and a women their children by birth or adoption, or the surviving remnant thereof (including single parents)"; that "[w]e believe Marriage is defined by a union between a man and a woman according to California state law"; and that "[w]e believe in Family Values that promote abstinence, marriage, fidelity in marriage and devotion to our children." *Id.* Plaintiffs' deposition testimony confirms the anti-homosexual import of their definitions of "natural family," "marriage" and the meaning of the flyer's exhortation to "preserve our workplace with integrity." *See, e.g.*, Melaugh Decl (Doc #43) Ex A (Reder-

ford Depo) at 8:8-22, 9:3-6, 37:1-41:1, 48:25-49:10, 135:22-136:13, 146:22-147:6, 194:1-4; id Ex C (Christy Depo) at 19:1-19, 24:14-21, 38:2-18.

The flyer came to the attention of Judith Jennings ("Jennings"), a lesbian employee in CEDA who used the copy machine near which the flyer was posted. Jennings Decl (Doc #41) ¶ 6; Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 130:21-131:6. Jennings felt "targeted" and "excluded." Jennings Decl (Doc #41) ¶ 7. Shortly after seeing the flyer, Jennings spoke with Rederford, whose name and phone number (along with Christy's) appeared on the flyer. *Id* ¶ 8. This conversation left Jennings "feeling anxious about working in the same office as [plaintiffs]" and she "could not believe that [she] worked with someone who condemned homosexuals like [her] so much." *Id* ¶ 9. Jennings and Rederford worked near one another and spoke with some frequency. *Id* ¶¶ 3, 8, 11; Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 75:15-25. After the conversation, Jennings was "scared," did not talk to Rederford any more and their "relationship really changed." *Id* at 78:8-17, 130:24-131:6; Jennings Decl (Doc #41) ¶ 9. Jennings decided to complain to the city attorney's office. *Id* ¶ 10. She complained not only about the flyer, but also about earlier episodes of distribution of anti-homosexual materials, at least one of which involved plaintiffs. *Id* ¶¶ 4-5.

Jennings' complaint was investigated by Joanne Braddock ("Braddock"), who was the administrative services manager in CEDA, and Calvin Wong ("Wong"), who was the director of building services in CEDA. Braddock Decl (Doc #4) ¶¶ 2-3. They interviewed Jennings, who seemed "upset and distraught" and "visibly nervous and shaken," *id* ¶ 3, and Braddock discovered the flyer posted in several locations other than near the copier, *id* ¶ 4. "After the investigation was complete, [Braddock] received an order from the City Attorney's office to take the * * * flyer down. The Plaintiffs'

flyer violated AI 71." *Id* ¶ 5. "AI 71" is an abbreviation for "Administrative Instruction 71," a personnel policy promulgated by the City Manager of Oakland, entitled "Equal Employment Opportunity/Anti-Discrimination/Non-Harassment Policy and Complaint Procedure." Lively Decl (Doc #52) Ex 1.13.

Plaintiffs acknowledge that they have alternative channels open to them to communicate their message. For example, Rederford acknowledges that she was not restricted from expressing her views on marriage or gay rights outside the workplace, over lunch or on a break. Melaugh Decl (Doc #43) Ex A (Rederford Depo) at 141:5-18. Nor were plaintiffs prohibited from organizing GNEA, and Rederford acknowledges that she was told "she could announce [her] group" through the City's e-mail system if she removed "verbiage that could be offensive to gay people" from her announcement. Id at 141:19-142:21. See also Melaugh Decl (Doc #43) Ex C (Christy Depo) at 27:10-21.

Defendants' roles in the removal of the flyer were minmal. Bobb, as City Manager, was the final authority responsible for approving administrative instructions, including AI 71. Melaugh Decl (Doc #43) Ex E (Bobb Depo) at 10:5-20. Bobb does not know and has never met plaintiffs. *Id* Ex A (Rederford Depo) at 72:24-25; *id* Ex C (Christy Depo) at 26:18-19; *id* Ex E (Bobb Depo) at 14:9-16. There is no evidence that Bobb participated in removal of the flyer.

Hicks may have spoken once to Rederford in casual conversation; she does not know Christy and Christy does not know her. *Id* Ex A (Rederford Depo) at 71:6-72:2; *id* Ex C (Christy Depo) at 26:22-23; *id* Ex F (Hicks Depo) at 8:20-25. Hicks believes that Wong ordered that the flyer be taken down, *id* at 35:8-25; Hicks does not recall that she ordered that the flyer be taken down, *id* at 36:1-2; and plaintiffs provide no evidence to contradict this account. Indeed, it appears that the flyer was removed on January 3, 2003, and

Hicks, who was on vacation at the time, did not return to the office until Monday, January 6, 2003. *Id* at 168:21-169:5. Although as a matter of heirarchy, Braddock and Wong reported to Hicks, who in turn reported to Bobb, there is no evidence that Bobb or Hicks directed or influenced Braddock's, Wong's or the City Attorney's actions or decisions with respect to taking the flyer down.

There were some conversations following removal of the flyer, but there is no evidence of any formal appeal by plaintiffs of Braddock and Wong's removal of the flyer. Hicks participated in a January 17, 2003, meeting (along with a representative from the city attorney's office) to discuss Jennings' feelings of harassment due to her sexual orientation, but Hicks declined to discuss at her deposition the contents of that meeting on the ground of attorney-client privilege, and plaintiffs have not interposed a formal objection to that claim of privilege. Hicks also discussed the flyer "with regard to Administrative Instruction 71" with Wong "[s]ometime in January of 2003." In late February 2003, Hicks transmitted a copy of AI 71 to all CEDA employees accompanied by a memorandum that described "recent[] * * * incidents" where "flyers were placed in public view which contained statements of a homophobic nature and were determined to promote sexual orientation based harassment," and noted that violation of AI 71 could result in "discipline up to and including termination." Compl (Doc #1) Ex 1; Melaugh Decl (Doc #43) Ex F (Hicks Depo) at 59-63 (discussing memo).

II

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v Liberty Lobby*, 477 US 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* And the burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp v Catrett*, 477 US 317, 322-23 (1986). When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v United States*, 799 F2d 254, 258-59 (6th Cir 1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence supporting its claim that a genuine issue of material fact exists. *TW Elec Sery v Pacific Elec Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 US at 255. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id* at 249.

The evidence presented by both parties must be admissible. FRCP 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publishing Co, Inc v GTE Corp*, 594 F2d 730, 738 (9th Cir 1979). Hearsay statements found in affidavits are inadmissible. *Japan Telecom, Inc v Japan Telecom America Inc*, 287 F3d 866, 875 nl (9th Cir 2004).

III

Plaintiffs' complaint prays specifically for prospective declaratory and injunctive relief; it does not specifically seek

damages. But the court assumes that plaintiffs also seek retrospective relief, for they seek a declaration "that the actions of Defendants in refusing to grant Plaintiffs the right to * * * inform * * * on private employee time are invalid and unconstitutional," Compl (Doc #1) at 12, and a major heading in their opposition to defendants' motion for summary judgment is "defendants are not immune from damages in this case." Pls Opp (Doc #46) at 17:2. Accordingly, the court will consider whether retrospective relief is available as against the named defendants. Defendants are named in both their individual and official capacities. As this distinction is significant for awards of retrospective relief, the court will consider individual capacity liability first and then turn to official capacity liability.

A

"Government officials sued in their individual capacities under § 1983 may raise the affirmative defense of qualified immunity * * *. Qualified immunity generally protects government officials in the course of performing the discretionary duties of their offices." *Butler v Elle*, 281 Fad 1014, 1021 (9th Cir 2002) (citing *Harlow v Fitzgerald*, 457 US 800, 818 (1982)). The question of qualified immunity is a question of law to be determined by the trial court. *Siegert v Gilley*, 500 US 226 (1991). "The first step in evaluating a qualified immunity defense is to determine whether the plaintiff has shown that the action complained of constituted a violation of his or her constitutional rights." *Butler*, 281 F3d at 1021 (citing *Sonoda v Cabrera*, 255 F3d 1035, 1040 (9th Cir 2001)). If the court is satisfied that a constitutional violation occurred, "the second step is to determine: (1) whether the violated right was clearly established, and (2) whether a reasonable public official could have believed that the particular conduct at issue was lawful." *Id.*

The court need not reach the second prong of the qualified immunity inquiry because, even assuming that *someone* vio-

lated plaintiffs' First Amendment rights, Hicks and Bobb—the only named defendants in this suit—are not responsible for such a violation. Supervisory officials are not liable under 42 USC § 1983 for the actions of subordinates under any theory of vicarious liability. *Hansen v Black*, 885 F2d 642, 645-46 (9th Cir 1989) (citing *Pembauer v City of Cincinnati*, 475 US 469, 479 (1986)). "A supervisor may be liable if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Id* (citing *Thompkins v Belt*, 828 F2d 298, 303-04 (5th Cir 1987). The former option is foreclosed because plaintiffs have come forward with no evidence establishing the personal involvement of Hicks or Bobb in the removal of the flyer. The latter option is the appropriate inquiry in an official capacity suit, and to this the court now turns.

B

As the *Hansen* court explained:

> Supervisory liability exists even without overt personal participation in the offensive act if the supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.

Id (citing *Thompkins*, 828 F2d at 304) (internal quotation marks omitted). It is primarily on this "policymaker" theory of liability that plaintiffs rest their case. A suit against Hicks and Bobb in their official capacities as policymakers (which the court accepts that they are for purposes of this motion) is in effect a suit against the City, the municipality for which they make policy. See *Hawaii v Gordon*, 373 US 57, 58 (1963).

In the seminal case establishing municipal liability under § 1983, the Supreme Court explained "it is when execution

of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v Dep't of Social Services*, 436 US 658, 694 (1978). Though plaintiffs attempt artfully to argue around the rule that § 1983 does not recognize the common law tort doctrine of *respondeat superior*, see Pls Opp (Doc #46) at 18-20, the Supreme Court has repeatedly held that Monell "rejected the use of the doctrine of *respondeat superior*." *City of Saint Louis v Praprotnik*, 485 US 112, 121 (1988).

Following *Monell*, the concept of policymaker liability was refined somewhat, and the court should at this point distinguish between two flavors of policymaker liability. There are, on the one hand, policies that are developed ex ante, approved by the lawmaking or other policymaking authority, and then applied prospectively. *See, e.g., Monell*, 436 US at 660-61 ("The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons."). On the other hand, there are suits in which the defendant, in his capacity as policymaker, has made a one-time decision—as, for example, when a plaintiff has sought redress through an appeal, which terminates with the policymaker's decision, cf *Praprotnik*, 485 US 112, 127 ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."), or when the policymaker made some other decision tailored to plaintiff's situation, *see, e.g., Pembauer*, 475 US at 476-77 (rejecting a court of appeals decision that a "single, discrete decision" made by a prosecutor and sheriff "on * * * one occasion" was insufficient to establish official capacity liability).

This distinction is significant, because plaintiffs cannot rest their case on the *Pembauer* and *Praprotnik* line of cases: Bobb and Hicks had no involvement at the time of the flyer's removal, nor is there evidence that they later, at plaintiffs' urging, reviewed and approved the propriety of removing the flyer. The only policymaking action plaintiffs can point to is the promulgation of AI 71 as prospective policymaking. As a threshold matter, the court observes that Hicks does not seem to have had the authority to make policy like AI 71, and accordingly cannot be held liable as a policymaker. See *Praprotnik*, 485 US 139-40 (citing *Pembauer*, 475 US 481-83) (discussing a hypothetical official who is a policymaker with respect to some matters and not others). But the court will assume, arguendo, that Hicks and Bobb are both properly regarded as policymakers with respect to the promulgation of AI 71.

As the *Hansen* court explained, for a policy to be a violation of a plaintiff's constutional rights, it must be "so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." 885 F2d at 646 (quoting *Thompkins*, 828 F2d at 304). This requirement was announced even in *Monell*, which noted that in that case "official policy" had been established "as the moving force of the constitutional violation." 436 US at 694. The Ninth Circuit has explained that "to be a moving force behind [an] injury, * * * the identified deficiency in the [policy must be] closely related to the ultimate injury. The plaintiff's burden is to establish that the injury would have been avoided" had the policy been different. *Gibson v County of Washoe*, 290 Fad 1175, 1196 (9th Cir 2002) (internal quotation marks and citations omitted). This question of causation is a matter for the jury, *see id*, and may not be well-suited to resolution on summary judgment. Accordingly, the court will assume (for purposes of this motion only) that AI 71 bears the required nexus to the violation plaintiffs claim.

The question, then, is whether plaintiffs' rights were in fact violated. As the court discussed at length in its order on defendants' motion to dismiss, Doc #32, this is a case about speech by a government employee, and accordingly, it is controlled by *Pickering v Board of Education*, 391 US 563 (1968), and its progeny. The court assumes familiarity with its prior order and the law discussed therein. The court concluded that the speech in question—i.e., the message of the flyer—touches on a matter of public concern and was a substantial or motivating factor in the removal of the flyer. 3/16/04 Order at 20:16-22:18. Defendants do not dispute those conclusions and the court sees no reason to revisit them.

The court next concluded that the remaining issue in the Pickering test—"whether defendants have [shown] that their interests as employers outweigh plaintiffs' interests in making the speech"—was "close," but, recognizing that the question was presented in the context of a motion to dismiss, "agree[d] with plaintiffs that defendants have not met their burden, at least at this stage of the proceedings." Id at 22:19-23:2. Now that the case has progressed to summary judgment, the court may undertake a better-informed analysis of this question of law. The court set out the legal standard in some detail in its prior order:

> [Employee] speech [on a matter of public concern] must be analyzed by "the *Pickering* balance [, which] requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." [*Connick v Myers*, 461 US 138, 151 (1938)]. The Court, quoting Justice Powell's separate opinion in *Arnett v Kennedy*, 416 US 134, 168 (1974), stated that:
>
> > [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders

> efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 US at 151. In evaluating the government's interest in preventing workplace disruption, the Court considered the impairment of "close working relationships," the "manner, time, and place in which [the message] is delivered" and whether the employee's speech "arises from an employment dispute concerning the * * * application of [office] policy to the speaker * * *." *Id* at 151-53. The Court also emphasized that the government employer did not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Id at 152. Taking these factors into consideration, the Court concluded that Myers' interest in being able to ask the question regarding political pressure was outweighed by the government's considerable interest in proscribing behavior that "would disrupt the office, undermine [its] authority, and destroy close working relationships." *Id* at 154.

Subsequently, the Ninth Circuit has interpreted *Pickering* and *Connick* to require the governmental employee to show that: (1) her speech was on a matter of public concern and thus was constitutionally protected; and (2) that the speech in question was a "substantial or motivating factor" for the adverse employment action. *Pool v Vanrheen*, 297 F3d 899, 906 (9th Cir 2002). If the employee fails to demonstrate that the speech addresses a matter of public concern, then the claim should be dismissed without further inquiry. See *Moran v State of Washington*, 147 F3d 839, 846 (9th Cir 1998). Should the employee make the first two showings, the employer

> then must show that its "legitimate administrative interests" in promoting workplace efficiency outweigh the employee's interest in freedom of speech. *Pool*, 297 F3d at 906. The inquiry into the protected status of speech is one of law, not of fact. *Id.*

3/16/04 Order at 18:14-19:28 (some alterations in original).

On plaintiffs' side of the balance is their interest in speaking. This interest is slight, as the restriction placed on their speech under the facts at bar was quite limited: Plaintiffs were prohibited from posting a particular flyer on an office bulletin board. Plaintiffs themselves acknowledge that no restriction has been placed on their speech outside of work (by, for example, threatening them with termination if they speak outside the workplace). They further acknowledge that they can discuss their views with co-workers as they wish at appropriate times (at lunch, on a break).

Plaintiffs further acknowledge that they were told they would be permitted to broadcast the existence of their group, subject to certain editorial restrictions. There are in addition a wide variety of alternative channels available to plaintiffs, and defendants' policy appears to be the sort of "manner, time and place" limitation that the Court implicitly approved in *Connick*, 461 US at 152.

Plaintiffs press the argument that their speech was chilled by Hicks' circulation to all CEDA employees in late February of AI 71 and a memo reminding them that noncompliance could result in discipline. This, however, does not amount to an adverse employment action and would be germane only to the question of prospective relief. Accordingly, the court finds that, for purposes of retrospective relief, plaintiffs have a limited interest in the suppressed speech.

Defendants' countervailing interest is also modest. As the court's recitation of the law makes clear, workplace disruption is the touchstone of the employer's interest in the *Pick-*

ering balance. Here, there is no dispute that Rederford and Christy's co-worker Jennings was disturbed by the flyer, nor is there dispute that removal of the flyer was the direct result of the investigation of Jennings' complaint. But whether the particular sensitivity of a single coworker amounts to cognizable workplace disruption under *Pickering* is far from clear. Furthermore, the bulk of Jennings' disquiet appears to have stemmed from her conversation with Rederford, an event that may have been precipitated by the flyer, but was nonetheless separate from the flyer. That said, the flyer appears to have been the root of a dust-up of sorts in the office—a *Pickering* disruption writ small.

The investigation of Jennings' complaint of harassment may conceivably be a form of workplace disruption. There is little detail in the record about the extent (in hours, for example) to which this disrupted Braddock and Wong in the performance of their normal duties, but it is undisputed that their investigation required at least an interview with Jennings, contact with the city attorney and drafting of a brief memorandum report. Of course, this sort of work—smoothing over employee grievances to maintain workplace harmony—is part of a supervisor's job description. In a sense, Braddock and Wong's efforts were "all in a day's work."

Defendants also urge that the City has an interest in enforcing its anti-harassment policies and complying with state and local anti-harassment law. While these policies doubtless serve noble purposes, the court is not convinced that these policies are independent interests weighing in the public employer's favor in the *Pickering* balance, for four reasons. First, the status of AI 71 as official policy pursuant to state law is irrelevant; it should go without saying that the First Amendment is a federal constitutional provision to which state and local laws must yield. See US Const Art VI cl 2. Second, the notion of enforcing a policy or law for its own sake is foreign to the *Pickering* analysis, which requires the

court to focus on reasonable predictions of workplace disruption. It may be that the policy or law is aimed at avoiding workplace disruption; but if that is so, then the efficacy of the policy or law—not its simple existence—is the interest that a defendant brings to the court. Third, it is bootstrapping to argue that a public employer has a legitimate interest in enforcing the very policy or law a plaintiff attacks as unconstitutional in its application to him. Indeed, if the policy or law is unconstitutional in some application, the state has *no* legitimate interest in enforcing it in that context. And fourth, had plaintiffs' flyer been removed in the absence of actual or predicted workplace disruption—i.e., if defendants' justification was enforcement of AI 71, standing alone—this case would more clearly present as a case of state enforcement of ideological orthodoxy. But as it stands, there is an element of maintaining a reasonably harmonious workplace in the face of strongly held opposing beliefs.

Having laid out plaintiffs' and defendants' competing interests, the court must strike the balance called for by *Pickering*. Neither side has presented a strong case. But, the facts being undisputed, the court must resolve the question of law posed by *Pickering*. The interests on both sides are slight: On the one hand, defendants' restriction of plaintiffs is far from a wholesale muzzling, but on the other hand, the suppressed speech was not patently inflammatory "fighting words." To be sure, it caused friction in the workplace, but there is a difference between episodes of friction—which are the daily incidents of life in a pluralistic society—and disruption—which impairs the government's ability to discharge its duties to its citizens. The City must tread carefully when it exercises its authority to suppress its employees' speech.

Because the flyer plainly addresses a matter of public concern, it is defendants' burden to show that the City's interest outweighs plaintiffs' interest. *Pool*, 297 F3d at 906. This balance must be resolved in the City's favor for two reasons.

First, plaintiffs' interest in this particular channel of communication is vanishingly small. It is undisputed that plaintiffs may promote GNEA outside of work and may do so even at work under proper conditions. Plaintiffs do not have a privileged First Amendment interest in communicating their message *to their officemates*, for their First Amendment rights derive from their status as citizens, not their status as employees. Their right to speak to their coworkers at CEDA is no greater than the right of a citizen at large to speak his message to CEDA employees—which is to say, plaintiffs have little rights at all in the particular channel they chose.

The second reason that defendants prevail is that their response to Jennings' complaint—removal of the flyer without any adverse employment action against plaintiffs—was a narrowly tailored and proportionate response to the actual workplace disruption or, perhaps better described, distraction. An actual adverse employment action against plaintiffs would very likely not be justified on these facts, and the City would be well to consider this for the future. But the City does have an "administrative interest" in avoiding situations that distract employees from their jobs. See *Pool*, 297 F3d at 906. *Pickering* counsels that public employers must, of necessity, be afforded some leeway in fixing their employees' attention on their tasks, free from upset stemming from public controversies having no bearing on the work of the employer.

Finally, the court addresses an argument for equal treatment that plaintiffs press—albeit without offering support in the case law. See, e.g., Pls Opp (Doc #46) at 5:17-23 (complaining of "double standards"; the refusal to treat "exclusionary slurs such [as] 'homophobes" as violations of AI 71; and a failure "to accommodate views concerning homosexuality [held] by * * * religious adherents"). Plaintiffs' disparate treatment argument, while superficially appealing, is simply not recognized by *Pickering* and its progeny, and with good reason: Intervention by a court in restrictions on

employee speech under *Pickering*'s balancing test already carries a substantial risk of interference with government operations; to inquire further into allegations of disparate treatment in restrictions of different employees' speech would remit the disciplinary operations of public agencies to the micromangement of the courts. In other words, *Pickering* draws a line: So long as a public employee's speech is restricted only when the employer presents an overbalancing concern of workplace disruption, a court will defer to the employer's decision, irrespective whether the employer has responded in kind to similar speech.

In sum, the court concludes that plaintiffs' First Amendment rights were not abridged by the removal of the flyer.

IV

Plaintiffs also seek prospective relief, specifically, an "[i]njunction restraining Defendants from prohibiting Plaintiffs from * * * communicating at their workplace" and a declaration of "the rights and other legal relations of the parties to the subject matter here in controversy." Compl (Doc #1) at 12-13. In essence, plaintiffs want guidance about what they can and cannot post around the office. The court does not dispense this sort of advice.

The only concrete controversy plaintiffs have presented to the court is the controversy over the flyer in the copy room. On the undisputed facts of that incident—considering plaintiffs' alternative channels of communication, the form of their speech and the ensuing events in their workplace—the court has concluded that plaintiffs' First Amendment rights were not violated. To the extent that plaintiffs seek to put other scenarios before the court, their challenge is unripe: Plaintiffs offer no details of the flyers they wish to post or other workplace speech they wish to make, and they offer no evidence regarding the workplace disruption that might (or might not) ensue. At most, plaintiffs point to Hicks' memo of

February 20, 2003, as a threat of termination, but a reminder in a widely circulated memo that compliance with policy is a condition of employment can hardly be taken as a concrete and imminent chill on protected expression or an individually directed threat of adverse employment action. Moreover, defendants have both moved on to other jobs, and plaintiffs offer no evidence that defendants' successors would take the same view of the application of AI 71.

Relatedly, the court doubts that it could craft any generalized equitable or declaratory relief in this area of the law. For better or worse, *Pickering* requires case-by-case analysis that turns on fact-intensive inquiries into a plaintiff's interest in speaking and the public employer's interest in efficient workplace operations. Cf *Moran*, 147 Fad at 847 (noting that because the *Pickering* analysis is so context-sensitive, defendants will typically have a strong argument for qualified immunity).

To be sure, matters at the extremes are clear. On one extreme, stifling of every expressive channel available to plaintiffs without any showing of workplace disruption would likely be a violation of their First Amendment rights; on the other extreme, a limited restriction closely tailored to actual and severe workplace disruption would likely not violate plaintiffs' First Amendment rights. Much as plaintiffs might hope otherwise, the gray area within this vast and multidimensional constitutional continuum is not reducible to the language of an injunction. This further confirms the court's view that no concrete actual controversy is before it with regard to plaintiffs' claim for prospective relief.

Accordingly, the court concludes that plaintiffs' claim for equitable and prospective declaratory relief is nonjusticiable and *sua sponte* dismisses that claim under FRCP 12(h)(3).

V

In sum, the court GRANTS defendants' motion for summary judgment (Doc #40) with respect to plaintiffs' claims for retrospective relief, and *sua sponte* dismisses plaintiffs' claims for prospective relief pursuant to FRCP 12(h)(3). The clerk is DIRECTED to close the file and terminate all motions.

IT IS SO ORDERED.

/s/ _____
VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CV 03-03542 VRW

GOOD NEWS EMPLOYEE ASSOC., *et al.*,
Plaintiff,

v.

JOYCE M. HICKS, *et al.*,
Defendant.

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against the plaintiffs.

Dated: February 16, 2005

Richard W. Wieking, Clerk

By: /s/ Cora Delfin
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C 03-3542 VRW

GOOD NEWS EMPLOYEE ASSOCIATION,
REGINA REDERFORD and ROBIN CHRISTY,
Plaintiffs,

v.

JOYCE M HICKS, in her individual and official capacities, as Deputy Executive Director of the Community & Economic Development Agency of the City of Oakland, ROBERT C BOBB, in his individual and official capacity, as City Manager of the City of Oakland and City of Oakland,
Defendant.

ORDER

Defendants Joyce M Hicks (Hicks) and Robert C Bobb (Bobb) move the court to dismiss plaintiffs Good News Employee Association (Good News), Regina Rederford (Rederford) and Robin Christy's (Christy) complaint: (1) pursuant to FRCP 41(b) for failure to prosecute (Doc # 25); and (2) pursuant to FRCP 12 (b) (6) on the grounds that the complaint fails to state a claim (Doc # 13). For the reasons set forth below, defendants' motion to dismiss for failure to prosecute is GRANTED as to claims against the City of Oakland but DENIED as to claims against Hicks and Bobb (Doc # 25). Defendants' motion to dismiss for failure to state a claim (Doc # 13) is GRANTED in part and DENIED in part.

I

A

The following facts are drawn from plaintiffs' complaint (Doc # 1) filed on July 30, 2003. Plaintiffs Rederford and Christy are employees of the City of Oakland (the City) and the cofounders of the Good News Employees Association (Good News). Compl at 2 ¶¶ 7-8. Rederford, Christy and their associates "regularly engage in prayer and other peaceful activities as part of their expressive, political, and religious activities with [Good News]." *Id* at 2 ¶ 9. At the time the events described in the complaint transpired, defendant Hicks was the Deputy Director of the City's Community and Economic Development Agency and was personally responsible for enforcing the policy at issue in this case. *Id* at 3 ¶ 11. Defendant Bobb was the City Manager and was also personally responsible for enforcing and drafting the policy. *Id* at 3 ¶ 12.

In March 2002, a group of homosexual employees was given access to the City's email system for the purposes of advertising various associational and political activities. *Id* at 4 ¶ 17. Plaintiffs asked to be given a similar opportunity to communicate with the other employees regarding their various Christian religious activities but were denied. *Id* at 4 ¶ 18. Plaintiffs allege that defendants denied them such opportunity because "[defendants] do not approve of the Christian beliefs, practices, and activities of [p]laintiffs." *Id.*

On or about January 3, 2003, plaintiffs decided to post a flyer on their employee bulletin board "to announce the existence and activities of [Good News] to the other City employees." *Id* at 4 ¶ 19. The flyer was entitled "Preserve Our Workplace With Integrity" and stated, "*Good News* Employee Association is a forum for people of *Faith* to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family

values. If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ XXX-XXXX or Robin Christy @ XXX-XXXX." *Id* at 4 ¶ 19, Exh 2 (emphasis in original). The flyer also contained a picture of six candles in a holder, arranged in the fashion of a menorah. *Id.* On that same date, defendants directed that the flyer be removed from the employee bulletin board. *Id* at 4 ¶ 19.

Both before and after plaintiffs posted their flyer, the employee bulletin board has been used by the employees for the promotion of "various political, social, and religious causes and events." *Id* at 4 ¶ 20. For example, employees have posted flyers concerning hate crimes, Osama bin Laden, Christmas celebrations, local sporting events, General Norman Schwartzkof's views on the September 11, 2001, terrorist attacks and the ability of war to eliminate social ills like slavery and fascism. *Id* at 4 ¶ 20, Exh 3. No punitive action was taken against any of the employees who posted such material, and apparently none of such material was removed from the employee bulletin board. *Id* at 4 ¶ 20. Plaintiffs allege that defendants "have shown an unlawful preference for human secularism and homosexual world views" and "have taken an affirmative and explicit stance against the religious views of [p]laintiffs." *Id* at 4-5 ¶ 20.

Plaintiffs allege that, on or about February 20, 2003, defendants developed and distributed an antidiscrimination/ nonharassment policy regarding employee conduct. *Id* at 5 ¶ 21, Exh 1. The letter accompanying the policy is dated February 20, 2003. *Id* at Exh 1 at 1. In the letter, however, defendant Hicks asserted that the policy had been in effect since January 1, 2003, and the policy itself is dated as effective on January 1, 2003. *Id* at Exh 1 at 1, 4. Hicks also explained in the letter that "[the City] ha[s] recently had incidents * * * where staff has inappropriately posted printed materials that are in violation of [the policy]. Specifically flyers were placed in public view which contained statements

of a homophobic nature and were determined to promote sexual orientation based harassment." *Id* at Exh 1 at 1. The accompanying policy describes prohibited types of behavior, the definition of harassing conduct, types of harassment by group (including religion-based and sexual-orientation-based discrimination) and complaint and investigation procedures. *Id.*

Plaintiffs maintain that the policy "is presently being enforced and was a direct and discriminatory response against the First Amendment activities of [p]laintiffs." *Id* at 5 ¶ 21. Plaintiffs assert that defendants "have not attempted to silence any other group of employees, although homosexual advocacy groups and others exist at [d]efendants' offices." *Id.* This practice, plaintiffs assert, constitutes "a censorship policy against anything [defendants] believe to be 'homophobic.'" *Id* at 5 ¶ 22. According to plaintiffs, defendants have unlawfully characterized plaintiffs' flyer as homophobic. *Id.*

B

Plaintiffs filed their complaint in this action on July 30, 2003, naming Hicks, Bobb and the City as defendants. Doc # 1. Plaintiffs' complaint stated causes of action pursuant to 42 §§ 1983 and 1988 against the defendants for violation of: (1) the United States Constitution's First Amendment's Free Speech Clause; (2) the First Amendment right to peaceable assembly; (3) the First and Fourteenth Amendment right to privacy; (4) the First Amendment's Free Exercise Clause; (5) the Fourteenth Amendment's Due Process Clause; (6) the Fourteenth Amendment's Equal Protection Clause; (7) the First Amendment's Establishment Clause; (8) the Fifth Amendment's Takings Clause; (9) the laws and regulations of the City on the basis of ultra vires acts; and (10) Article I § 4 of the California Constitution.

On November 7, 2003, defendants Hicks and Bobb filed the instant Rule 12(b)(6) motion to dismiss and noticed the

motion for January 22, 2004. Doc # 13. In its motion, defendants indicated that defendant City had not been explicitly included in the motion to dismiss because the City had not been served as of the date the motion was filed. Mot Dism (Doc # 13) at 1:6 n1.

On November 26, 2003, the parties filed a stipulation to continue the hearing on the motion to dismiss to February 5, 2004. Doc # 15. On January 5, 2004, the court ordered that the hearing be rescheduled for that date. Doc # 17. Subsequently, on January 8, 2004, plaintiffs filed their opposition to defendants' motion to dismiss. Doc # 18. Defendants filed their reply on January 22, 2004. Doc # 19.

In spite of stipulating to the hearing date for the motion, plaintiffs failed to attend the scheduled February 5, 2004, hearing. Doc # 22. At the motion hearing, defendants also informed the court that plaintiffs still had not served the City. Later that day, the court ordered plaintiffs to show cause why the action should not be dismissed for failure to prosecute due to plaintiffs' failure to serve the City and to attend the motion hearing. 2/5/04 OSC (Doc # 21) at 2:15-19. The court gave defendants leave to submit their expenses incurred both in attending the February 5 hearing and in defending the entire case. *Id* at 2:20-22. The court set the matter for further hearing on March 11, 2004. *Id* at 2:24-3:2.

On February 25, 2004, plaintiffs submitted a declaration in response to the court's OSC, listing a "number of unusual and catastrophic occurrences in both [plaintiffs' attorney's] personal and professional life." Decl Richard Ackerman (Ackerman Decl; Doc # 24) at 2 ¶ 6. During the six-week period prior to the motion hearing date, attorney Ackerman had experienced: (1) extensive health problems with his baby son; (2) a flood in his home the week before Christmas; (3) an office fire two weeks after the flood; and (4) computer problems. *Id* at 2-4 ¶¶ 6(1)-(4).

On February 26, 2004, defendants filed a formal motion to dismiss for failure to prosecute. Doc # 25. As they had indicated at the February 5 hearing, defendants stated that the City had not been served and provided substantial supporting documentation of that fact. Mot Fail Pros (Doc # 25) at 1:16-3:21; see also Decl Angela Padilla (Padilla Decl; Doc # 27) at 1-2 ¶¶ 2-9, Exhs A-F. Defendants also contended that plaintiffs provided no good excuse for not appearing at the February 5 hearing. Mot Fail Pros at 3:22-4:11. Defendants requested $156,612.64 in legal fees and expenses (a figure that includes attorney fees). *Id* at 4:12-5:12. Plaintiffs filed a response to the motion on March 2, 2004 (Doc # 28), and defendants filed a reply on March 4, 2004 (Doc # 30).

At the March 11, 2004, hearing, the court took argument both on the alleged failure to prosecute and the Rule 12(b)(6) motion to dismiss. At the hearing, plaintiffs conceded that they had failed properly to serve the City and also represented that the City's presence as a defendant was not critical to further prosecution of the action. Plaintiffs' counsel also accepted responsibility for the failure to appear on February 5, 2004, and conceded that plaintiffs were responsible for defendants' expenses for the unnecessary appearance. Defendants nevertheless urged that the entire case should be dismissed pursuant to Rule 41(b), based in part on the contention that plaintiffs' responses to the OSC contained misstatements about service on the City rising to the level of Rule 11 violations.

Accordingly, the court must decide: (1) whether plaintiffs have discharged the February 5, 2004, OSC; and (2) whether any or all of the ten claims stated in plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(6).

II

A

The court first determines whether plaintiffs have discharged the OSC with respect to failure to prosecute. The court, may dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." FRCP 41(b). To determine whether an action should be dismissed for failure to prosecute, the court should consider: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) risk of prejudice to defendants; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. *Pagtalunan v Galaza*, 291 F3d 639, 642 (9th Cir 2002). The five factors favor dismissal of the claims against the City but not of the claims against Hicks and Bobb.

The first factor of expeditious resolution of litigation "always favors dismissal." *Id* at 642 (citation omitted). Thus, this factor tilts toward dismissal with respect to the claims against all defendants.

The second factor regards the management of the court's docket and also favors dismissal of all the claims. The court must be able to manage its docket "without being subject to routine noncompliance of litigants such as [plaintiffs]." *Id.* One Ninth Circuit judge has remarked "the weight of the docket-managing factor depends upon the size and load of the docket, and those in the best position to know what that is are our beleaguered trial judges." *Id* at 644 (Trott, J, concurring). Plaintiffs have failed repeatedly to serve the City, despite numerous stipulations extending their deadline to do so, and plaintiffs have also disregarded the hearing date to which they stipulated. In light of the undersigned's rather substantial caseload, plaintiffs' disregard of rules and deadlines makes this factor tilt toward dismissal.

The third factor involves risk of prejudice to defendants. The Ninth Circuit views prejudice in conjunction with delay and has stated that "[t]he longer the delay, the more likely prejudice becomes." *Nealey v Transportacion Maritima Mexicana, SA*, 662 F2d 1275, 1280 (9th Cir 1980); see also Pagtalunan, 291 F3d at 642. Plaintiffs' excuse or justification for their disobedience or delay is also relevant. *Nealey*, 662 F2d at 1280.

This factor favors dismissal with respect to the claims against the City. First, plaintiffs provide no reasonable excuse for failure to serve the City. In their opposition to defendants' Rule 41(b) motion, plaintiffs contend that service upon two City officials (Bobb and Hicks) was sufficient, despite the fact that the summons did not separately name the City as a defendant. See Opp Mot Dism Fail Pros (Doc # 28) at 3:15-16. Plaintiffs, however, have stipulated on several occasions that the City has not yet been served. See Padilla Decl at 2 ¶¶ 3, 5, Exhs A, C. Moreover, plaintiffs conceded at the March 11 hearing that they had not properly served the City. Such stipulations and representations should be binding upon plaintiffs. See *American Title Ins Co v Lacelaw Corp*, 861 F2d 224, 226 (9th Cir 1988). Second, defendants have pointed to potential prejudice because plaintiffs' failure to serve the City has forced defendants to file a Rule 12(b)(6) motion to dismiss with respect to some, but not all, of the defendants. This would allow plaintiffs to "see how this [c]ourt [would] rule" before deciding whether to prosecute or whether voluntarily to dismiss its claims against the City. Def OSC Response (Doc # 30) at 3:4-6. In combination with plaintiffs' lack of explanation for their failure, defendants have shown that the prejudice factor favors dismissal of the claims against the City.

But with respect to plaintiffs' claims against Hicks and Bobb, this showing is not met. Although plaintiffs do not indicate why another attorney could not have attended the

February 5 hearing, plaintiffs at least demonstrate that attorney Ackerman faced a number of travails during January and February 2004. If defendants could demonstrate prejudice, this explanation would likely be insufficient, since Ackerman (as a practicing attorney) arguably should have handed the case to one of his colleagues if his personal life was too chaotic adequately to prosecute this case. The only prejudice to defendants, however, is that they were forced to attend an unnecessary motion hearing. While this cost defendants some money and delayed resolution of their motion, it does not appear substantially to have hampered their ability to defend against the claims. Additionally, defendants' contention that plaintiffs' OSC responses are materially false is insufficient to demonstrate prejudice. Despite the misstatements, the court is well aware that plaintiffs have not properly served the City, and defendants will suffer no adverse consequences as a result.

The fourth factor is availability of less drastic alternatives. With respect to the claims against the City, the court conceivably could extend plaintiffs' deadline properly to serve the City. But defendants currently have a motion to dismiss pending, and allowing plaintiffs to serve an additional defendant might interfere with the disposition of this motion. Further, plaintiffs have conceded the utility of pursuing the action against the City. Thus, less drastic alternatives do not. seem particularly appealing with respect to the claims against the City. The claims against Hicks and Bobb, however, are a different matter. Plaintiffs could be ordered to pay defendants' expenses incurred as the result of attending the February 5 hearing, and this serves to correct much of the prejudice defendants experienced as a result of that unnecessary appearance.

The fifth factor of public policy favors not dismissing any of the claims, as public policy favors resolution on the merits. *Pagtalunan*, 291 F3d at 643. Thus, four factors favor

dismissal of the claims against the City, while three factors favor allowing the claims against Hicks and Bobb to proceed. The February 5, 2004, OSC is thus DISCHARGED with respect to the claims against Hicks and Bobb, but not with respect to the claims against the City. Accordingly, defendants' motion to dismiss pursuant to Rule 41(b) is DENIED as to Bobb and Hicks but is GRANTED as to the City (Doc # 25).

B

The court must also consider whether plaintiffs should be responsible for paying defendants' expenses incurred in prosecuting this case. Defendants submit a rather hefty request for expenses—over $150,000. In light of the fact that the claims against Hicks and Bobb ought to proceed on the merits, forcing plaintiffs at this time to reimburse defendants for all their expenses incurred in this lawsuit is certainly excessive.

In the court's view, plaintiffs should be responsible for defendants' unnecessary expenses incurred in attending the February 5, 2004, hearing. Plaintiffs took responsibility for their error with respect to the hearing and also conceded that defendants were entitled the expenses incurred as a result. Additionally, awarding expenses for attending the hearing cures any potential prejudice to defendants that resulted from the unnecessary appearance. Defendants' expenses for attending the hearing were $1,353.50. Def Response OCS at 6:7. Accordingly, the court ORDERS that plaintiffs reimburse defendants in the amount of $1,353.50.[1]

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[1] The court is satisfied that the amount of this award is fair, based on plaintiffs' concession at the March 11 hearing that such an amount would be appropriate. But defendants ought to be aware that, should they request attorney fees in the future, they must submit sufficient documentation to establish the reasonableness of their claimed number of hours and their claimed hourly rates, in keeping with the standards the court set forth in

III

A

FRCP 12(b) (6) motions to dismiss essentially "test whether a cognizable claim has been pleaded in the complaint." *Scheid v Fanny Farmer Candy Shops, Inc*, 859 F2d 434, 436 (6th Cir 1988). FRCP 8(a), which states that plaintiff's pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," provides the standard for judging whether such a cognizable claim exists. *Lee v City of Los Angeles*, 250 F3d 668, 679 (9th Cir 2001). This standard is a liberal one that does not require plaintiff to set forth all the factual details of her claim; rather, all that the standard requires is that plaintiff give defendant fair notice of the claim and the grounds for making that claim. *Leatherman v Tarrant County Narcotics Intell & Coord Unit*, 507 US 163, 168 (1993) (citing *Conley v Gibson*, 355 US 41, 47 (1957)). To this end, plaintiff's complaint should set forth "either direct or inferential allegations with respect to all the material elements of the claim". *Wittstock v Van Sile, Inc*, 330 F3d 899, 902 (6th Cir 2003).

Under Rule 12(b)(6), a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Hughes v Rowe*, 449 US 5, 9 (1980) (citing *Haines v Kerner*, 404 US 519, 520 (1972)); see also *Conley*, 355 US at 45-46. All material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. See *In re Silicon Graphics Inc Sec Lit*, 183 F3d 970, 980 n10 (9th Cir

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Allen v BART, C00-3232 VRW, Order Granting Attorney Fees (Doc # 92), and modified in *Gilliam v Sonoma Cty*, C-02-3382 VRW, Order Granting Attorney Fees (Doc # 51). Those orders are available on the website for the Northern District of California, as well as in the Northern District's electronic filing database.

1999). But "the court [is not] required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v Golden State Warriors*, 266 F3d 979, 988 (9th Cir 2001) (citing *Clegg v Cult Awareness Network*, 18 F3d 752, 754-55 (9th Cir 1994)).

Review of a FRCP 12(b)(6) motion to dismiss is generally limited to the contents of the complaint, and the court may not consider other documents outside the pleadings. *Arpin v Santa Clara Valley Transp Agency*, 261 F3d 912, 925 (9th Cir 2001). The court may, however, consider documents attached to the complaint in connection with a motion to dismiss. *Parks School of Business, Inc v Symington*, 51 F3d 1480, 1484 (9th Cir 1995). Additionally, "[t]he court need not * * * accept as true allegations that contradict matters properly subject to judicial notice * * *." *Sprewell*, 266 F3d at 988 (citing *Mullis v United States Bankr Ct*, 828 F2d 1385, 1388 (9th Cir 1987)).

B

Plaintiffs' complaint states causes of action for violation of: (1) the First Amendment's Free Speech Clause; (2) the First Amendment right to peaceable assembly; (3) the First and Fourteenth Amendment right to privacy; (4) the First Amendment's Free Exercise Clause; (5) the Fourteenth Amendment's Due Process Clause; (6) the Fourteenth Amendment's Equal Protection Clause; (7) the First Amendment's Establishment Clause; (8) the Fifth Amendent's Takings Clause; (9) the laws and regulations of the City on the basis of ultra vires acts; and (10) Article I § 4 of the California Constitution. The court addresses each claim in turn.

1

Plaintiffs' Free Speech Clause claims seem to be premised on two arguments: (a) defendants' removal of plaintiffs' flyer violates plaintiffs' free speech rights; and (b) defendants'

policy regarding discrimination and harassment is unconstitutionally vague and overbroad.

a

The court first addresses plaintiffs' claim regarding defendants' removal of plaintiffs' flyer. Speech by a government employee is governed by the standard first articulated in *Pickering v Bd of Educ of Township High School Dist 205, Will County*, 391 US 563 (1968) and further clarified in *Connick v Myers*, 461 US 138 (1983). See *Waters v Churchill*, 511 US 661, 668 (1993). Pickering involved teacher Pickering, who was fired by the education board on the basis of a letter he sent to the local newspaper. The letter was critical of the way the education board and school superintendent had handled revenue-raising proposals. *Pickering*, 391 US at 564. In analyzing Pickering's claim that his dismissal violated his First Amendment rights, the Supreme Court recognized that "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, 461 US at 140 (citing *Pickering*, 391 US at 568). But the *Pickering* court also emphasized that "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 US at 568. The Court found that Pickering's letter addressed a "matter of legitimate public concern" on which "free and open debate is vital to informed decision-making by the electorate." *Id* at 571-72. Reasoning that the education board did not have strong interests in limiting Pickering's contribution to the public debate, since "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication," the court found that Pickering could not be dismissed on the basis of his letter. *Id* at 573-574.

The Supreme Court further described the standards for protected governmental employee speech in its opinion in *Connick*. In that case, assistant district attorney Myers, displeased at having been transferred to a different section of her office, prepared and distributed a questionnaire to solicit the opinions of her coworkers on issues regarding office policy and morale. *Connick*, 461 US at 140-41. Myers was subsequently terminated on the basis of her refusal to accept the transfer and because her distribution of the questionnaire was considered "an act of insubordination." *Id* at 141. In analyzing whether Myers' termination had been made in violation of the First Amendment, the Supreme Court noted that *Pickering* and its progeny "involved safeguarding speech on matters of public concern." *Id* at 145. The Court drew a line between speech on a matter of public concern and speech on a matter of private concern: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id* at 146. As such, when an employee speaks or seeks to speak not as a citizen on a matter of public interest, but instead as "an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision * * *." *Id* at 147. To determine whether the employee's speech addresses a matter of public concern, the Court stated, the reviewing court must review the "content, form, and context of a given statement * * *." *Id* at 147-48. Employing such procedure, the Court found that most of Myers' questions regarding discipline and morale were designed "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors." *Id* at 148. Moreover, "Myers did not seek to inform the public" about the results of her

survey. As such, the Court concluded that most of the questionnaire did not touch on matters of public concern. *Id.*

The Court found that one of Myers' questions—relating to whether the employees felt pressured to work on political campaigns—could be considered a matter of public concern. Id at 149. As such, the Court concluded that such speech must be analyzed by "the *Pickering* balance[, which] requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Id at 151. The Court, quoting Justice Powell's separate opinion in *Arnett v Kennedy*, 416 US 134, 168 (1974), stated that:

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Connick, 461 US at 151. In evaluating the government's interest in preventing workplace disruption, the Court considered the impairment of "close working relationships," the "manner, time, and place in which [the message] is delivered" and whether the employee's speech "arises from an employment dispute concerning the * * * application of [office] policy to the speaker * * *." *Id* at 151-53. The Court also emphasized that the government employer did not need "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id* at 152. Taking these factors into consideration, the Court concluded that Myers' interest in being able to ask the question regarding political pressure was outweighed by the government's considerable interest in proscribing behavior that "would disrupt the office, undermine

[its] authority, and destroy close working relationships." *Id* at 154.

Subsequently, the Ninth Circuit has interpreted *Pickering* and *Connick* to require the governmental employee to show that: (1) her speech was on a matter of public concern and thus was constitutionally protected; and (2) that the speech in question was a "substantial or motivating factor" for the adverse employment action. *Pool v Vanrheen*, 297 F.3d 899, 906 (9th Cir 2002). If the employee fails to demonstrate that the speech addresses a matter of public concern, then the claim should be dismissed without further inquiry. See *Moran v State of Washington*, 147 F.3d 839, 846 (9th Cir 1998). Should the employee make the first two showings, the employer then must show that its "legitimate administrative interests" in promoting workplace efficiency outweigh the employee's interest in freedom of speech. *Pool*, 297 F.3d at 906. The inquiry into the protected status of speech is one of law, not of fact. *Id.*

Defendants first argue that plaintiffs cannot state a free speech claim because the only speech identified in the complaint (the flyer) does not touch on a matter of public concern. Mot Dism at 5:10-6:2. Defendants argue that the flyer was only an invitation to join a group committed to "preserving integrity in the workplace" and that such group had been formed in response to a "perceived inequity in the City's decision to allow a homosexual group of employees use of the City's e-mail while restricting [p]laintiffs' use of the e-mail." *Id* at 5:2126. Plaintiffs disagree with this characterization of the flyer, saying that "[s]ame sex marriage, homosexual rights, and the balancing of [f]aith with developments in the homosexual rights arena[] are at the very forefront of modern dialogue about human rights, legal progression, and socio-political philosophy." Opp Mot Dism (Doc # 18) at 6:16-19.

The court agrees with plaintiffs that the flyer touches on a matter of public concern. "Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies." *Pool*, 297 F3d at 907 (citation omitted; emphasis in original). But the Ninth Circuit has defined speech on a public concern in a very broad fashion, including speech "'that can fairly be considered as relating to any matter of political, social, or other concern to the community * * *.'" *Tucker v California Dep't of Educ*, 97 F3d 1204, 1210 (9th Cir 1996), quoting *Gillette v Delmore*, 886 F2d 1194, 1197 (9th Cir 1989). This seems to "include almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker*, 97 F.3d at 1210 (emphasis in original). Moreover, the employee "need not address the public at large for his speech to be deemed to be on a matter of public concern." *Id.*

In the case at bar, plaintiffs' flyer might reasonably be read to implicate homosexuality, a topic of considerable public interest, especially given developments of the past few years concerning same-sex marriage, civil unions, "Don't Ask, Don't Tell" personnel policies of the military and the like. Of course, this topic must be inferred, as there is no explicit reference to homosexuality in the flyer. The flyer appears more directly aimed at the City's personnel policy ("preserving integrity in the workplace"), which is indisputably a matter of public concern. The flyer suggests that the meeting will focus on whether the City's personnel policies are appropriate in light of plaintiffs' moral outlook ("Natural Family, Marriage and Family values"). Taken together, homosexuality and a group that will be debating such an issue in the context of public employment can be fairly characterized as a matter of public concern. See *Greer v Amesqua*, 212 F.3d 358, 371 (7th Cir 2000) (finding that a newspaper

release concerning homosexual favoritism at a fire department constituted a matter of public concern). It is also true that the flyer solicits only members of plaintiffs' workplace and may have been written and posted in response to an internal personnel dispute that plaintiffs were having with defendants. But the court would be hard-pressed to characterize the flyer as "having no relevance to the public's evaluation of the performance of government agencies." On the contrary, the City's policies regarding homosexuals are no doubt of considerable interest to the public. Accordingly, the court finds that the flyer touches on a matter of public concern.

With respect to the second question—whether the speech was a substantial or motivating factor in the adverse employment action—the court finds that plaintiffs' complaint is sufficient. The complaint alleges that defendants removed the flyer on the basis of its characterization as "homophobic." See Compl at 5 ¶ 22. And defendants' anti-discrimination policy refers to plaintiffs' flyers as being "homophobic" in nature. Id at Exh 1 at 1. The complaint thus links the character of the speech with defendants' decision to take adverse action against plaintiffs. Of course, the adverse action—removal of the flyer—is considerably less serious than the adverse actions taken in most other cases. See, e g, *Pickering*, 391 US at 564 (teacher terminated); *Connick*, 461 US at 141 (attorney terminated).

Given that the first two factors are satisfied, the court must undertake the final inquiry—whether defendants have met their burden in showing that their interests as employers outweigh plaintiffs' interests in making the speech. Defendants argue that their interest in maintaining an efficient office environment outweighs any interest that plaintiffs have in posting the flyer. Mot Dism at 6:3-8:11. Plaintiffs respond that the need for maintaining an efficient office is not implicated by the flyer. Opp Mot Dism at 7:1-22. Although

the question is close, the court agrees with plaintiffs that defendants have not met their burden, at least at this stage of the proceedings.

The court begins its balancing inquiry by examining the strength of plaintiffs' interests in posting the flyer. All in all, the court cannot conclude that plaintiffs' interests were particularly strong, at least in contrast with other cases in which free speech rights have been restricted. Plaintiffs do not allege that they were unable to provide information about their organization to their coworkers in any other manner. Nor does defendants' anti-discrimination policy seem to apply outside the workplace. Plaintiffs are free to post flyers at other locations and have not been restricted from voicing their views on homosexuality, the anti-discrimination policy, the natural family or any other related topic in any other location besides the workplace bulletin board (and perhaps the workplace email system). A government employee's interest in speech is much stronger when the prohibition or regulation is broad and sweeping, rather than limited to particular contexts. See Tucker, 97 F3d at 1210 (finding that the balance favored the employee when the regulation precluded all religious speech of any form); *Los Angeles Police Protective League v Gates*, 579 F Supp 36, 39-40 (CD Cal 1984) (finding that the employee's interest was weaker than the government employer's interest when the restriction on employee speech was limited and allowed speech at other times and in other manners).

Plaintiffs also spend considerable time in their opposition brief arguing that they "have a [r]ight to [r]eligious expression at the [w]orkplace." Opp Mot Dism at 7:23. It is no doubt true that religious speech is entitled to the same level of protection as other forms of speech. See, e.g., *Child Evangelism Fellowship of New Jersey, Inc v Stafford Township School Dist*, 233 F Supp 2d 647, 656 (D NJ 2002) (citing *Heffron v Int'l Soc'y for Krishna Consciousness*, 452 US 640,

647 (1981)). But there is no reason to believe that religious expression deserves any more protection in the workplace than nonreligious expression does, and plaintiffs present the court with virtually nothing from which the court might draw such a conclusion. Most of the cases that plaintiffs cite do not involve religious expression by government employees. Cf *Widmar v Vincent*, 454 US 263 (1981) (considering whether a state university could prohibit a religious group from using generally available facilities); *Police Dep't of the City of Chicago v Mosley*, 408 US 92 (1972) (considering constitutionality of labor ordinance that exempted peaceful picketing from its general prohibition on picketing near a school); *Daugherty v Vanguard Charter School Academy*, 116 F Supp 2d 897 (WD Mich 2000) (considering claims of parents who alleged that their minor children had been subjected to Christian influences at school in violation of the Establishment Clause).

The only other case plaintiffs cite for this proposition is *May v Evansville-Vanderburgh School Corp*, 787 F2d 1105 (7th Cir 1986). In that case, Judge Posner rejected the plaintiff schoolteacher's arguments that she was entitled under the First Amendment to use school property for religious purposes. The only basis for such a claim that Judge Posner found plausible was if such a claim was based on public/nonpublic forum doctrine. See *id* at 1112-15. But Judge Posner also cautioned that "we might * * * question the relevance of any sort of 'forum' analysis to a case where government employees are seeking to use government premises for the communication of ideas and opinions to each other only, so that the public at large is not involved." *Id* at 1114. Plaintiffs present no argument regarding why forum analysis should apply to plaintiffs' speech, rather than the traditional government employee analysis under *Pickering* and *Connick*. Indeed, the Ninth Circuit has rejected forum analysis in favor of *Pickering/Connick* balancing in a similar context. *Tucker*, 97 F3d at 1209-10 (finding that no public

forum was created by the governmental employer allowing employees to post materials on the walls and instead adopting the traditional balancing test to evaluate employee speech). In short, plaintiffs have provided the court with no reason why religious expression in the workplace should be entitled to any greater protection than other forms of expression.

Despite plaintiffs' relatively weak interests in posting the flyer, the court cannot conclude that defendants' interests in removing the flyer were particularly strong either. In reaching this conclusion, the court recognizes that the Supreme Court determined decades ago that "the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 US at 568. Thus, in the context of regulating speech, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters*, 511 US at 675. And "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.*

In evaluating whether the governmental employer has an efficiency interest that outweighs the employee's speech interest, the court may look to several factors: (1) the time, place and manner in which the speech arose; (2) whether the speech "impairs discipline by superiors or harmony among co-workers [or] has a detrimental impact of close working relationships for which personal loyalty and confidence are necessary"; or (3) "impedes the performance of the speaker's duties or interferes with the regular operations of the enterprise." *Pool*, 297 F3d at 908-09. In evaluating the governmental employee's interest, the court should consider the speech as it appeared to the employer, if the employer's

view of the speech is reasonable. See *Waters*, 511 US at 677-78.

Based on these factors, the court finds that defendants interests in restricting plaintiffs' speech are not compelling. First, the court considers the time, place and manner of the speech. It is true that plaintiffs' speech was posted at the City workplace on an office bulletin board and thus was in an area within the City employer's control. This makes plaintiffs' case different from cases like *Pickering*, in which the plaintiff's speech appeared in a public newspaper. Accepting the allegations in the complaint as true, however, plaintiffs' speech was not accompanied by anything that would have exacerbated its effects in the workplace. For example, the speech was not explicitly threatening nor expressly directed toward a particular employee or group of employees. Instead, the flyer was merely posted on the bulletin board, along with all the rest of the notices. Thus, this factor does not provide defendants with a particularly strong reason for removing the flyer.

Second, the court considers defendants' interests in maintaining close working relationships and in preventing interference with business operations. In so doing, the court recognizes that defendants have significant interests in restricting discriminatory speech about homosexuals. Allowing such speech in the workplace could undermine the working relationships between the employees, which would impede the employer's effective functioning. Additionally, as defendants point out, defendants have a duty under state law to prevent workplace discrimination on the basis of sexual orientation. See Cal Gov Code § 12940(a). This is significant not just because of the gravity with which defendants must treat such a state law duty. If defendants fail to take precautions against discrimination against homosexuals, defendants risk the possibility of employees bringing hostile work environment lawsuits. Such lawsuits would certainly disrupt the effective

functioning of the workplace, both from the impact on personnel and from the potential drain on the City's resources. Further, "[a] discriminatorily abusive work environment * * * can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v Forklift Systems, Inc*, 510 US 17, 22 (1993).

Plaintiffs contend that the flyer cannot reasonably be construed as homophobic. In evaluating whether the flyer touched on a matter of public concern, the court noted that the flyer seems to implicate the issue of homosexuality through the use of language such as "natural family" and "family values," terms used in the heated debate over gay marriage. Although other readings of the flyer are certainly possible, it is not unreasonable to read the flyer as expressing a viewpoint that disagrees with either homosexuality or issues that may concern homosexuals (i.e., gay marriage).

But if plaintiffs' contention is that the flyer is not outwardly discriminatory enough to cause likely disruption in the workplace, then the court must agree. Plaintiffs argue that the flyer does not implicate defendants' interests because plaintiffs are a peaceful group who have caused no actual disruption in the workplace. A government employer is entitled to restrict speech that it reasonably believes will disrupt the workplace and need not wait to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 US at 152. The government employer, however, must make a "reasonable prediction" of disruption before it may restrict the speech. See *Moran*, 147 F3d at 846.

Plaintiffs' speech, while perhaps indicating disagreement with the message promoted by homosexual groups, does not seem the type of expression that would reasonably create workplace disruption. The flyer's indirect implication of plaintiffs' disapproval of homosexuality simply is not the

kind of blatant or offensive speech that on its face would cause disorder or controversy. Indeed, plaintiffs' flyer is quite different from other government employee speech about homosexuals that courts have found may be restricted. For instance, in *Greer*, the plaintiff firefighter "publicly excoriated [the fire chief] as a lesbian harboring 'radical agendas' and announced [the fire chief and another employee] to be 'homosexual women' despite the fact that neither had publicly declared their sexual orientation." *Greer*, 212 F3d at 372. The firefighter in *Greer* aggressively challenged the authority of the fire chief, made reckless statements regarding her sexual orientation and caused sensational news coverage in several newspapers. Further, the firefighter's remarks clearly referred to the fire chief's (alleged) sexual orientation and disparaged her on that basis. Such speech was both outwardly offensive, disrespectful and likely to create public controversy. By contrast, plaintiffs in this case have made no announcements to the general public, have used no openly derogatory terms about homosexuals and have not specifically targeted particular individuals.

Similarly, in *Lumpkin*, a clergyman who held a position on San Francisco's Human Rights Commission stated publicly that "[t]he homosexual lifestyle is an abomination against God" and that his religious beliefs included a passage from Leviticus that states that a man who sleeps with a man should be put to death. *Lumpkin*, 109 F3d at 1499. The Ninth Circuit, in holding that the mayor was free to remove this individual from the Human Rights Commission post, stated that "[a]s a private citizen, Reverend *Lumpkin* is perfectly free to preach vigorously and robustly that homosexuality is a sin. But he did not enjoy that same unrestrained freedom while he occupied the important and prestigious office of a Human Rights Commissioner." *Id* at 1501. As with *Greer*, the language employed by Reverend *Lumpkin* was inflammatory and directly condemned homosexuality. Such is not the case with plaintiffs' flyer. Additionally, the city of San Francisco had a

much stronger interest in removing an employee who espoused anti-gay sentiments when he occupied a leadership position on a human rights commission established to promote the interests of minority groups such as homosexuals. Here, plaintiffs' employment with the City simply is not in a comparable position.

Thus, the court's view is that the flyer, while implicating some disagreement with homosexuality, simply does not rise to the level necessary to make workplace disruption a likely event. Perhaps additional facts outside the pleadings would reveal a different story - perhaps the speech was accompanied by other more overt language, or perhaps grave workplace disruption actually resulted from plaintiffs' posting of the flyer. But those would be issues more appropriately resolved at summary judgment or trial. Considering no facts but those pled in the complaint and taking the allegations from that complaint as true, the court is not persuaded that the flyer is so patently offensive that it would cause disruption in the workplace. With respect to the flyer, therefore, this conclusion undermines most of the strong interests that defendants have in eliminating discrimination against homosexuals and preventing speech or behavior that would harass homosexuals.

Based on its analysis, the court is left with fairly weak ir terests on both sides: neither plaintiffs nor defendants have presented an especially compelling case. Defendants, however, have the burden of persuasion under the *Pickering/ Connick* balancing test. Given that defendants have not established particularly strong interests in restricting the speech in this case, the court must DENY the motion to dismiss directed to plaintiffs' Free Speech Clause claim based on the flyer.

b

Defendants also contend that any First Amendment facial challenge to the City's anti-discrimination policy should be

dismissed. The complaint appears to allege such a challenge, as it states that the policy "*sweep[s] within [its] ambit* protected First Amendment protection," "is unconstitutionally vague on its face" and "[does] not provide adequate notice of [its] scope [or] sufficient guidance for [its] application." Compl at 6 ¶ 31, 32, 35 (internal quotations omitted). Plaintiffs characterize this challenge as one that is based on vagueness. See Opp Mot Dism at 11:26-13:5. Invalidating a statute on such grounds is considered "strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort.'" *Nat'l Endowment for the Arts v Finley*, 524 US 569, 580 (1998), quoting *Broadrick v Oklahoma*, 413 US 601, 613 (1973). The standard for stating a claim under the doctrines of vagueness is correspondingly strict.

"[E]ven when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *California Teachers Ass'n v State Bd of Educ*, 271 F3d 1141, 1150-51 (9th Cir 2001). "Uncertainty at a statute's margins" is not enough to warrant facial invalidation if "it is clear what the statute proscribes in the vast majority of its intended applications.'" *Id* at 1151, quoting *Hill v Colorado*, 530 US 703, 733 (2000). Thus, in evaluating a facial challenge on the basis of vagueness, the court should determine whether "'citizens who desire to obey the statute will have * * * difficulty in understanding it * * *.'" *Kannisto v City & County of San Francisco*, 541 F2d 841, 845, quoting *Colten v Kentucky*, 407 US 104, 110 (1972). The court should also assess whether "a substantial amount of legitimate speech will be chilled." *California Teachers Ass'n*, 271 F3d at 1152.

As a preliminary matter, defendants assert that the complaint does not sufficiently state a claim for vagueness because it does not specifically identify the language in the policy that allegedly renders the policy void for vagueness. Mot Dism at 14:15-19. The only specific language plaintiffs use in reference to the policy is the word "homophobic,"

which appears only in the cover memorandum but not the actual policy itself. See Compl at ¶¶ 68, 69 and Exh 1 at 1. Because plaintiffs have not identified the language of the policy on which their vagueness challenge is based, the complaint fails to give defendants fair notice of the grounds for plaintiffs' claim. Accordingly, the void for vagueness claim should be dismissed on this ground alone.

Even assuming that plaintiffs have adequately stated a claim, the court finds that the policy is sufficiently clear that it is not susceptible to a facial challenge on vagueness grounds. The policy forbids, for example, "discrimination" and "harassment" based on an employee's protected status (race, gender, sexual orientation, religious affiliation, etc), as well as providing examples of unacceptable conduct. See Compl, Exh 1 at 4-11. Employees who desire to comply with the policy should have little trouble understanding what the terms contained in the policy mean. Additionally, because most employees will understand the common concepts articulated in the policy, the court cannot conclude that a *substantial* amount of legitimate speech would be chilled.

Other courts have upheld similar anti-discrimination policies in the face of vagueness challenges. In *Sypniewski v Warren Hills Reg'l Bd of Educ*, 307 F3d 243, 266 (3d Cir 2002), the Third Circuit found that, although words like "racially divisive" were imprecise, the challenged regulation still "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." The *Sypniewski* court also emphasized that because the challenged regulation was a school disciplinary rule, the court should be less demanding in considering the precision of the regulation's wording. *Id.* Likewise, the court here should be less demanding because the regulation applies to government employees, whose speech is subject to greater regulation by the government than is the speech of ordinary citizens.

Accordingly, the court GRANTS defendants' motion to dismiss as to plaintiffs' First Amendment facial challenge to defendants' anti-discrimination policy.

2

Defendants also argue that plaintiffs have failed to state a claim for violation of the First Amendment's right to peaceable assembly. Defendants contend that the claim should be dismissed because plaintiffs do not plead facts that would establish a substantial interference with plaintiffs' associational rights. Mot Dism at 11:3-8. To constitute a cognizable claim for a freedom of association violation, the interference with associational rights must be "'direct and substantial'" or "'significant.'" *Fighting Finest, Inc v Bratton*, 1996 US App LEXIS 28748, *8 (2d Cir), quoting *Lyng v UAW,* 485 US 360, 366 (1988). Thus, the government may engage in conduct "that incidentally inhibits protected forms of association." *Fighting Finest*, 1996 US App LEXIS 28748 at *8.

In *Fighting Finest*, the Second Circuit held that the government's decision to prohibit a police officers' boxing team from posting notices on police premises did not directly and substantially interfere with the team members' ability to exercise their right to freedom of association. *Id* at *9. A similar approach is warranted here. Plaintiffs do not allege any facts that would establish that defendants' decision not to allow plaintiffs to post advertisements on the work bulletin board substantially interfered with plaintiffs' ability to exercise their right to associate. Even if plaintiffs' allegations can be construed to mean that defendants' actions curtailed plaintiffs' ability to recruit new members from the workplace, such allegations are insufficient to establish a direct and substantial interference. Plaintiffs have pled no facts that would show that defendants prevented the group members from associating together or that defendants significantly burdened the members' ability to do so. *See id.*

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' freedom of association claim.

3

Defendants next argue that plaintiffs' claim for violation of privacy should be dismissed. Defendants argue that plaintiffs fail to state a cognizable privacy claim because they fail to plead facts that would establish that defendants significantly intruded on plaintiffs' privacy rights. Mot Dism at 12:1-16. In *Griswold v Connecticut*, the seminal case recognizing a constitutional right to privacy, the Supreme Court stated that "the First Amendment has a penumbra where privacy is protected from *government intrusion.*" 381 US 479, 483 (1965) (emphasis added). Actions for such inappropriate government intrusion arise when plaintiff seeks to protect her interests in either "avoiding disclosure of personal matters * * * [or] independence in making certain kinds of important decisions" in matters regarding marriage, procreation, family relationships and child rearing. *Baron v Meloni*, 556 F Supp 796, 799-800 (WDNY 1983) (citing *Whalen v Roe*, 429 US 589, 598-600 (1977) and *Paul v Davis*, 424 US 693, 713 (1976)), aff'd, 779 F2d 36 (2d Cir 1985). To survive a motion to dismiss, the allegations of an invasion of a privacy interest must show "more than a trivial or incidental interference" with the privacy interest. *Scott v Kuhlmann*, 746 F2d 1377, 1378 (9th Cir 1984).

Plaintiffs have failed to allege any facts that would establish any sort of governmental intrusion. Further, plaintiffs have failed to allege any facts that would establish that any such governmental intrusion would affect an interest in either avoiding disclosure of personal matters or in making important decisions regarding marriage, procreation, family relationships or child rearing. As defendants put it, "[t]o the extent [p]laintiffs are alleging that [defendants] failed to *assist* them in exercising their right to association * * *, there is no authority to support such a claim" under the privacy

rubric. See Mot Dism at 12:8-11. Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' privacy claim.

4

Defendants next argue that plaintiffs' claim for a violation of the Free Exercise Clause of the First Amendment should be dismissed. The court agrees with defendants for several reasons. First, a free exercise claim must be premised on the impact of government action upon plaintiffs' "sincerely held 5 religious beliefs." *NLRB v Hanna Boys Center*, 940 F2d 1295, 7 1305-06 (9th Cir 1991). Such impact must constitute an undue 3 burden on the free exercise of such beliefs. *Hershinow v Bonamarte*, 735 F2d 264, 266 (7th Cir 1984). Plaintiffs do not allege that defendants interfered with their religious beliefs per se, but rather that defendants interfered with their ability to *express* their religious beliefs. See Compl at 9 ¶ 63. Without more facts that would establish how interference with expression unduly burdens their religious beliefs, plaintiffs' claim is insufficient as stated.

Second, "[t]he right of free exercise does not relieve 7 an individual of the obligation to comply with a valid and 3 neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious prescribes) (or proscribes)." *Miller v Reed*, 176 F3d 1202, 1206 (9th Cir I 1999), quoting *Employment Division v Smith*, 494 US 872, 879 a (1990). Defendants' anti-discrimination policy is neutral and 3 generally applicable to all of defendants' employees at the 1 agency in question. See *Child Evangelism Fellowship*, 233 F Supp 5 2d at 665 (finding a restriction on the use of the school 5 bulletin board to be neutral and generally applicable because 7 its limitations were based on "legitimate pedagogical, 3 professional, or safety concerns," rather than religious criteria). Plaintiffs have alleged that the policy is not neutral because defendants have allowed other employees to post messages, and the allowance of such speech shows "an un-

lawful preference for human secularism and homosexual world views." Compl at 4 ¶ 20. But plaintiffs' complaint and attached exhibits do not demonstrate that other material concerning homosexuality was posted and that defendants failed to censor such material. Plaintiffs also repeatedly argue that the policy does not prevent religious discrimination, but this assertion is plainly false. The policy *expressly* protects employees from religious discrimination. Compl, Exh 1 at 5, 11-2. In short, plaintiffs present no basis for finding the policy not to be neutral and generally applicable.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' free exercise claim.

5

Defendants also argue that plaintiffs have failed to state a claim for a violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs' complaint, for all intents and purposes, appears to base this claim on the antidiscrimination policy's alleged vagueness. Such is the way that defendants construe the claim in their motion to dismiss. To the extent that the Due Process claim states such a cause of action, that claim is dismissed for the reasons articulated above in section II (B)(1)(b).

Plaintiffs, however, contend that defendants have misconstrued the Due Process claim. Instead, plaintiffs claim that defendants have violated their procedural due process rights by taking away plaintiffs' right to free speech and plaintiffs' flyer with no procedural protections. Opp Mot Dism at 14:3-26. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*, 424 US 319, 333 (1979), quoting *Armstrong v Manzo*, 380 US 545, 552 (1965). To state a procedural due process claim, plaintiffs must plead facts that establish: (1) the deprivation of a constitutionally protected liberty or property interest; and (2) the denial of

adequate procedural protections. *Brewster v Bd of Educ of Lynwood Unified School Dist*, 149 F3d 971, 982 (9th Cir 1998).

As an initial matter, as defendants point out in their reply brief, Reply Mot Dism (Doc # 19) at 8:1-13, plaintiffs' complaint is utterly devoid of factual allegations that support a procedural due process claim. Plaintiffs' factual allegations in its opposition brief cannot be incorporated by reference into their complaint. Plaintiffs' due process claim in no way provides fair notice to defendants and should be dismissed on this ground alone.

Even if the court considers plaintiffs' claim in light of the allegations plaintiffs attempt to incorporate through their opposition brief, the claim still must fail. Plaintiffs' claim is premised on the notion that "there is a fundamental right, which is as important as the right to own property." Opp Mot Dism at 14:13. Plaintiffs cite no authority for this proposition. While it may be true that fundamental rights are as important (or more so) than property, the court is reluctant to apply procedural due process analysis to the alleged deprivation of plaintiffs' "fundamental rights" in the absence of reliance on sound legal authority. In any case, plaintiffs' complaint fails to allege which "fundamental right" upon which their due process claim is based. Accordingly, plaintiffs' procedural due process claim based on their "fundamental rights" should be dismissed.

The only other possible basis for a procedural due process claim is the flyer, which plaintiffs assert is property within the meaning of the procedural due process rubric. "'Property interests * * * are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Brewster*, 149 F3d at 982, quoting *Board of Regents v*

Roth, 408 US 564, 577 (1972). The court doubts that plaintiffs could establish they retained a property interest in a flyer over which they relinquished control by posting on an office bulletin board. In any event, plaintiffs' complaint fails to allege facts that would establish that plaintiffs had a property interest in the flyer. Plaintiffs' procedural due process claim based on the "deprivation" of the flyer is therefore insufficient.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' due process claim as well.

6

Defendants next argue that plaintiffs' complaint fails to state a claim for violation of equal protection. Plaintiffs' complaint states that "[d]efendants have treated [p]laintiffs in a discriminatory and punitive way that is not applied to other groups and individuals wishing to engage in expressive activity." Compl at 10 ¶ 73. Plaintiffs contend in their opposition brief that they are members of a protected class based on their status as religious adherents. Opp Mot Dism at 15:1-3. In their complaint, however, plaintiffs do not allege that defendants' allegedly discriminatory treatment is based on or burdens plaintiffs based on their status as a protected class. Even if the complaint could be construed as giving fair notice that plaintiffs' equal protection claim is based on their status as religious adherents, plaintiffs' complaint fails to plead facts that demonstrate that the alleged discriminatory policy and treatment were based on religion. Plaintiffs assert that defendants "do not approve of the Christian beliefs, practices, and activities of [p]laintiffs" and "have taken an affirmative and explicit stance against the religious views of [p]laintiffs." Compl at 4-5 ¶ 18, 20. But the policy, which plaintiffs have attached to their complaint, contradicts any such bald assertions by plaintiffs that defendants' actions were based on religion. Rather, the cover memorandum to the policy makes clear that defendants' actions were premised on the perceived nature of plaintiffs' speech as homophobic. Plaintiffs plead

no facts that would substantiate their allegations that defendants were motivated by religion.

Plaintiffs also assert that defendants' policy violates their equal protection rights because it fails to provide protection against discrimination on the basis of religion. See Opp Mot Dism at 3:19-22, 15:3-6. But as the court has already stated, the policy explicitly protects religious adherents. Any equal protection claim on this basis is utterly devoid of merit. Additionally, to the extent that plaintiffs' equal protection claim is premised on differentiation between people who approve of homosexuality and people who do not, such a claim also fails to state that plaintiffs belong to a protected class. People who oppose homosexuality do not constitute a protected class. See *Okwedy v Molinari*, 150 F Supp 2d 508, 521 (EDNY 2001).

Plaintiffs have thus failed sufficiently to plead that they belong to a protected class or that the allegedly discriminatory policy was based on their status as members of a protected class. When "there is no allegation that the [policy] burdens a suspect class or a fundamental interest, [defendants] must demonstrate only that the classification scheme is 'rationally related to a legitimate state interest.'" *Hotel & Motel Ass'n of Oakland v City of Oakland*, 344 F3d 959, 970 (9th Cir 2003). If the government demonstrates that the policy is rationally related to a legitimate governmental purpose, then the policy will be upheld. *Green v City of Tuscon,* 340 F3d 891, 896 (9th Cir 2003).

Defendants have demonstrated that the antidiscrimination policy is rationally related to a legitimate governmental purpose. The anti-discrimination policy is designed to further "equal employment opportunity" and to ensure that all employees are free from harassment and discrimination. See Compl, Exh 1 at 4. Protecting employees from discrimination is a legitimate goal, especially in light of the fact that a "discriminatory and abusive work environment * * * can and

often will detract from employees' job performances, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris,* 510 US at 22. Moreover, the eradication of workplace discrimination against homosexuals *specifically* is a legitimate goal that is "entirely consistent with the goals and objectives of our civil rights statutes." *Peterson v Hewlett-Packard Co*, 2004 US App LEXIS 72, *9 (9th Cir).

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' equal protection claim.

7

Defendants next move for dismissal of plaintiffs' Establishment Clause claim. Defendants first argue that the complaint fails to state a claim for an Establishment Clause violation because it does not allege government conduct that would constitute the establishment of religion. Mot Dism at 17:5-13. Before determining the validity of an Establishment Clause claim, the court should "first determine whether there is even an issue of establishment of religion." *Fleischfresser v Directors of School Dist* 200, 15 F3d 680, 687 (7th Cir 1994). An "allegation of some amorphous religion becomes so much speculation as to what some people might believe * * * [and] makes it difficult * * * to reconcile [plaintiffs'] claims with the purpose of the Establishment Clause." *Id* at 688. The only allegation in the complaint regarding the alleged religion established by defendants is that "[d]efendants have shown an unlawful preference for human secularism and homosexual world views." Compl at 4 ¶ 20. Not only is this allegation amorphous in the sense that the court intended in *Fleischfresser*, but it also fails to allege that "human secularism" and "homosexual world views" are forms of religion.

Even were this not enough to dismiss plaintiffs' claim, the test articulated in *Lemon v Kurtzman*, 403 US 602 (1971), would preclude plaintiffs from having stated a good claim.

When a policy is challenged under the Establishment Clause, the policy must: (1) have a secular purpose; (2) neither advance nor inhibit religion as its primary effect; and (3) not foster excessive government entanglement with religion. *Peloza v Capistrano Unified School Dist*, 37 F3d 517, 520 (9th Cir 1994) (citing *Lemon*, 403 US at 612-13). Under the first prong, to find a potential Establishment Clause violation, the court "must find that the action was 'motivated wholly by religious considerations.'" *Fleischfresser*, 14 F3d at 680, quoting *Lynch v Donnelly*, 465 US 668, 680 (1984). If the policy has a clear secular purpose, then plaintiffs' allegations otherwise are not material. See *Fleischfresser*, 15 F3d at 688. Because there is a clear secular purpose behind the anti-discrimination policy—preventing discrimination in the work-place—plaintiffs' claim is insufficient. As to the second prong, plaintiffs' claim must support the conclusion that defendants' action "amount[s] to an endorsement of religion." Id at 688. Plaintiffs' complaint nowhere contains facts that allege or support such a conclusion. Finally, to meet the third prong of the Lemon test, the complaint must allege facts that would establish that the government made inquiries into religious doctrine, delegated state power to a religious body or undertook detailed monitoring or close administrative contact with religious bodies. See *Hernandez v Commissioner of Internal Revenue*, 490 US 680, 696-97 (1989). Plaintiffs' complaint contains no such allegations.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' Establishment Clause claim.

8

Defendants also argue that plaintiffs' claim under the Fifth Amendment's Takings Clause should be dismissed. Plaintiffs premise their claim on the allegation that "[d]efendants impermissibly damaged the property of [p]laintiffs herein." Compl at 11 ¶ 80. The only reasonable way to interpret this allegation is that the property in question is the flyer that

defendants removed from the employee bulletin board. The court agrees with defendants that plaintiffs' Takings Clause claim should be dismissed for three reasons.

First, in order to qualify as an unconstitutional "taking," the government's alleged deprivation must have caused plaintiffs some pecuniary loss. See *Brown v Legal Foundation of Washington*, 538 US 216, 123 S Ct 1406, 1421 (2003). In this regard, the court should consider whether plaintiffs have any "distinct investment-backed expectations" that the governmental actions undermined. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1019 n8. Plaintiffs have not alleged that defendants' actions in taking down the flyer have caused them any pecuniary loss, nor have plaintiffs alleged that they had any investment-backed expectations connected with the flyer.

Second, to state a good claim under the Takings Clause, plaintiffs must allege that they have a protected property interest. Property interests protected by the Takings Clause are not created by the Constitution but rather are defined by other independent sources like state law. *Ruckelshaus v Monsanto Co,* 467 US 986, 1001 (1984). Plaintiffs fail to allege any such basis that would establish that they had a property right in the flyer.

Third, in a physical takings case, "the property owner must have sought compensation for the alleged taking through available state procedures." *Daniel v County of Santa Barbara,* 288 F3d 375, 382 (9th Cir 2002). When plaintiffs fail to allege in their pleadings that they have pursued state administrative or judicial remedies, the takings claim is unripe for review. *Hotel & Motel Ass'n of Oakland*, 344 F3d at 966. Plaintiffs have failed to allege that they have sought out such state remedies.

For these reasons, plaintiffs' claim is insufficient, and the court accordingly GRANTS defendants' motion to dismiss plaintiffs' claim under the Takings Clause.

9

Defendants also contend that plaintiffs' complaint fails to state a claim for ultra vires action because defendants' actions were, as a matter of law, not ultra vires. Mot Dism at 20:14-21:7. An officer acts ultra vires only when he acts with no authority whatsoever. *Pennhurst State School & Hospital v Halderman*, 465 US 89, 101 n11 (1984). Defendants had the authority to remove the flyer under the anti-discrimination policy, which went into effect before plaintiffs posted the flyer. The policy requires that managers monitor the work-place to ensure that it is free from the discrimination the policy prohibits. Compl, Exh 1 at 14-15. This clearly gives defendants the authority to remove the flyer under the policy.

Moreover, plaintiffs cannot state an ultra vires claim on the basis that the policy was misapplied to their flyer. "[A]n ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore insufficient." *Pennhurst*, 465 US at 101 n11. To the extent that plaintiffs' ultra vires claim is premised on their allegation that defendants mistakenly characterized their flyer as "homophobic," such a claim is likewise insufficient.

Accordingly, the court GRANTS defendants' motion to dismiss plaintiffs' ultra vires claim.

10

Plaintiffs' final claim is for a violation of Article I § 4 of the California Constitution, a state law claim. That section of the California Constitution pertains to free exercise claims, and California courts have adopted the federal standard for free exercise claims in assessing state free exercise claims. See *Vernon v City of Los Angeles*, 27 F3d 1385, 1392 (9th Cir 1994); *Brunson v Dep't of Motor Vehicles*, 72 Cal App 4th 1251, 1255 (1999) (citing *Smith v California Fair Employment & Housing Comm'n*, 12 Cal 4th 1142 (1996)). Given that the court has dismissed plaintiffs' free exercise claims

under the federal constitution, plaintiffs' free exercise claims under the California constitution should also be dismissed. Thus, the court GRANTS defendants' motion to dismiss the California free exercise claim.

III

In sum, the court GRANTS defendants' Rule 41(b) motion to dismiss with respect to the City but DENIES the motion with respect to Hicks and Bobb (Doc # 25). The court DENIES defendants' Rule 12(b)(6) motion to dismiss (Doc # 13) as to plaintiff's Free Speech Clause claim. The court GRANTS defendants' Rule 12(b)(6) motion to dismiss (Doc # 13) as to the remainder of plaintiffs' claims. Those nine claims are accordingly DISMISSED.

IT IS SO ORDERED.

/s/
VAUGHN R WALKER
United States District Judge

APPENDIX E

Preserve Our Workplace With Integrity

Good News Employee Association is a forum for people of **Faith** to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family values.

If you would like to be a part of preserving integrity in the Workplace call Regina Rederford @ 238-7534 or Robin Christy @ 238-6993.

Bulletin Board (this was removed on 1/3/03) RK

BEST AVAILABLE COPY

NEW YORK POST

WANTED

DEAD OR ALIVE

Osama bin Laden

For mass murder in New York City

000590

Except for ending
Slavery. Fascism.
Nazism. & Communism
WAR
HAS NEVER
SOLVED
ANYTHING

000591

Endorsed by US Representative Barbara Lee

EAST BAY!

Represent Yourself!

STOP War on Iraq War on us

Meet 10:30am
MOSSWOOD PARK
(MacArthur & Broadway, near Kaiser)
& MacArthur BART)

March 11:30am
TO FRANK OGAWA PLAZA
(14th & Broadway, 12th St. BART)

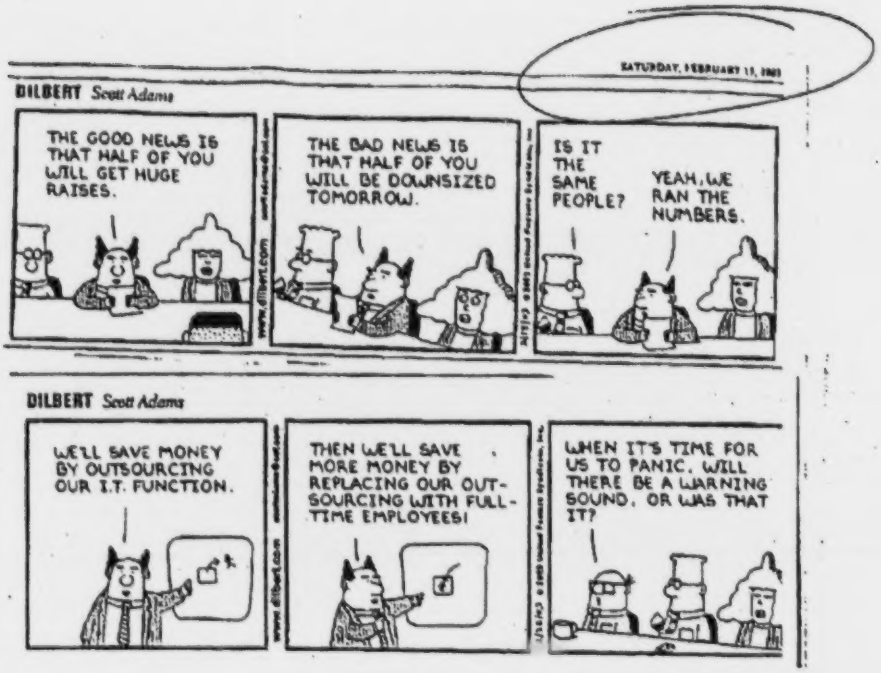
RALLY 1:30pm

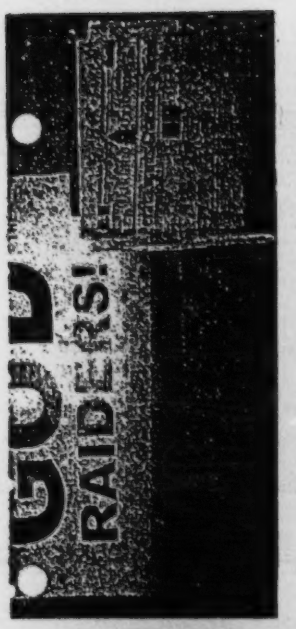
SATURDAY
April 5
OAKLAND

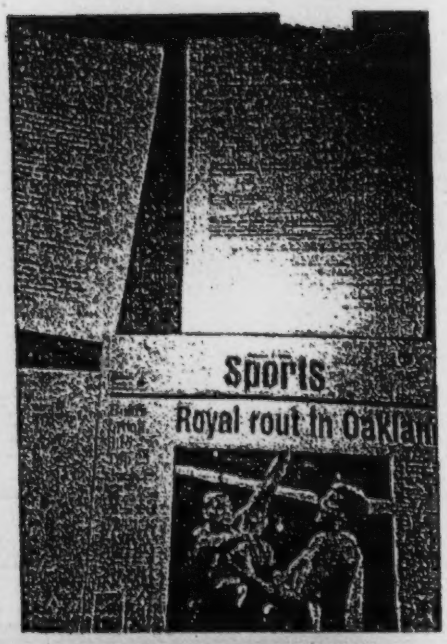
APRIL 5TH PEACE & JUSTICE COALITION
[illegible]

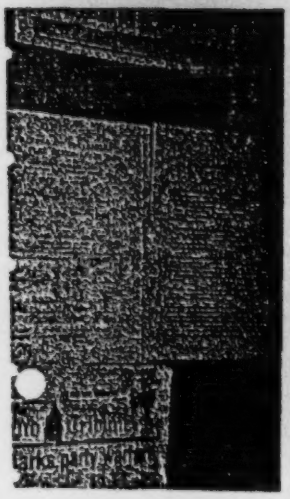
www.pmvrc.net 510-654-6966

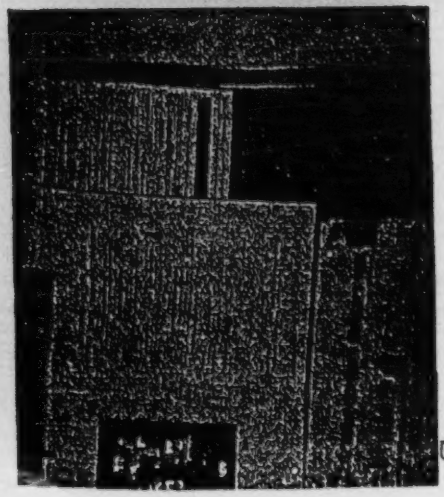
Books NOT Bombs • Jobs NOT Jails • Healthcare NOT Warfare • Rights NOT Racism


SATURDAY, FEBRUARY 15, 2003
DILBERT Scott Adams
THE GOOD NEWS IS THAT HALF OF YOU WILL GET HUGE RAISES.
THE BAD NEWS IS THAT HALF OF YOU WILL BE DOWNSIZED TOMORROW.
IS IT THE SAME PEOPLE?
YEAH, WE RAN THE NUMBERS.
DILBERT Scott Adams
WE'LL SAVE MONEY BY OUTSOURCING OUR I.T. FUNCTION.
THEN WE'LL SAVE MORE MONEY BY REPLACING OUR OUT-SOURCING WITH FULL-TIME EMPLOYEES!
WHEN IT'S TIME FOR US TO PANIC, WILL THERE BE A WARNING SOUND, OR WAS THAT IT?









J Scott 4/10/03 Return has a set of Pictures

000601

BEST AVAILABLE COPY

Martin Luther King, Jr. Rally

Monday, January 20, 2003

Join in a Multicultural Peace Celebration & Rally
10:30 a.m. at the ILWU Warehouse Union Hall
99 Hegenberger Road (at Pardee Drive) in Oakland

Celebrate with: The Brookfield Senior Center Choir
Medicine Warriors Dancers • All Nations Drum
Rev. Mark Clifton, East Oakland Church of God in Christ
Keynote: Oakland School Board President Greg Hodge on
"How would Dr. King respond to our current world situation?"
Father Jay Matthews, St. Benedict's Parish
A Representative from the Office of Congresswoman Barbara Lee
Youth Speakers include Jacar Reese, Javhan Cosby and representatives from EarthTeam.

Emcees: EBRPD Director Doug Siden & Former Oakland City Councilmember Carter Gilmore.

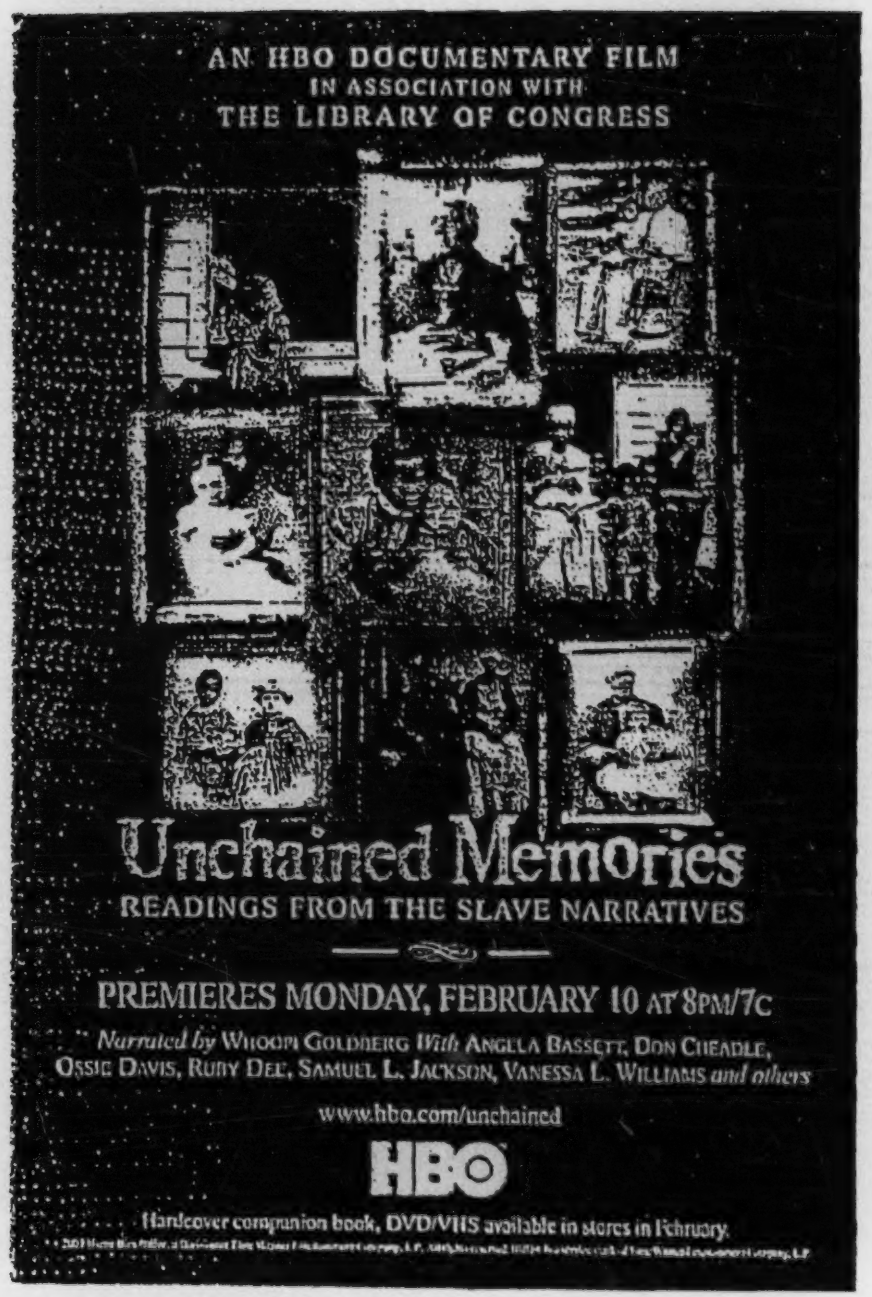
Endorsed by: The Alameda County Central Labor Council, Former State Assemblywoman Dion S. Aroner, Brookfield Athletic Advisory Council, State Assemblywoman Wilma Chan, Community Reformed Church, Earth Team, International Longshore and Warehouse Union - Warehouse Local, Alameda County Supervisor Alice Lai-Bitker, Congresswoman Barbara Lee, Alameda County Supervisor Nate Miley, Oakland City Council Member Larry Reid, Save the Bay, Oakland School Board Member Dan Siegel

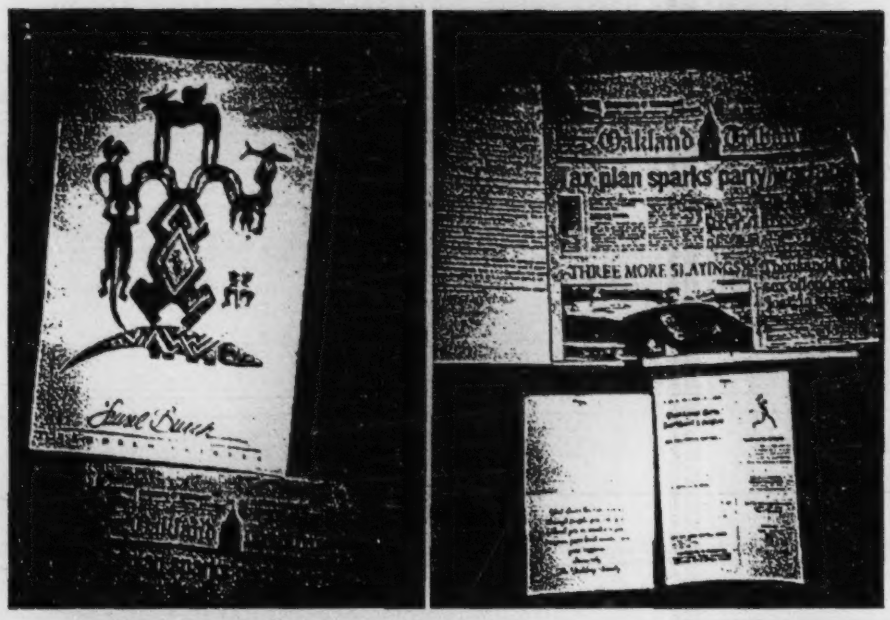
Sponsored by: The Martin Luther King, Jr. Rally Committee, the East Bay Regional Park District, The Martin Luther King, Jr. Freedom Center

PLEASE JOIN US AFTER THE RALLY AT A SPECIAL KING DAY SERVICE PROJECT FROM 1:00 - 3:00 PM: NATIVE PLANT RESTORATION IN MLK, JR. REGIONAL SHORELINE PARK!

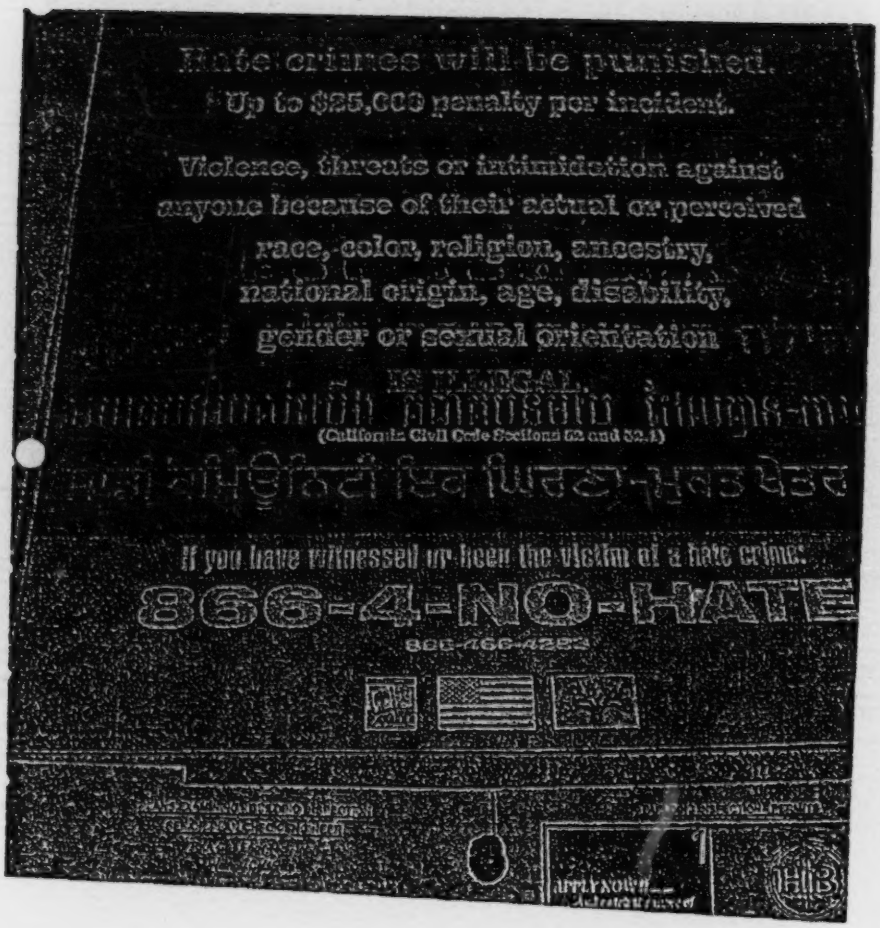
000602

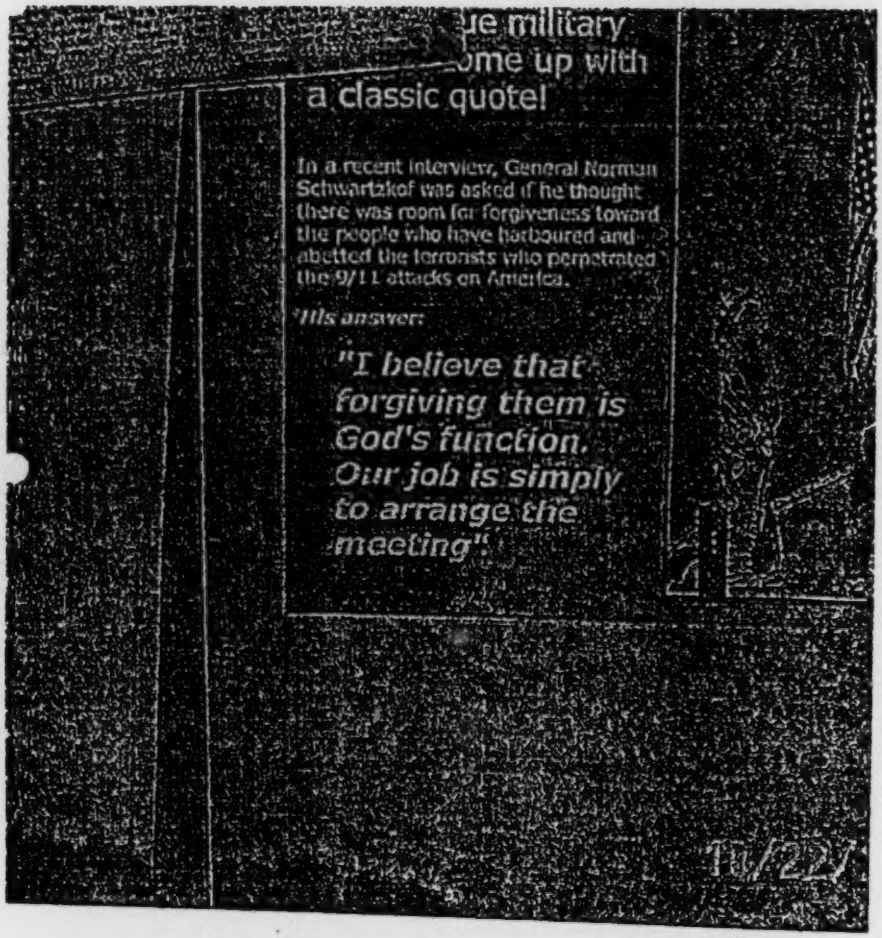
more information, please contact Mrs. Charlie Mae Davis, MLK, Jr. Rally Committee at (510) 638-0365 or Claire Greensfelder, MLK, Jr. Freedom Center at (510) 383-1087


AN HBO DOCUMENTARY FILM
IN ASSOCIATION WITH
THE LIBRARY OF CONGRESS
Unchained Memories
READINGS FROM THE SLAVE NARRATIVES
PREMIERES MONDAY, FEBRUARY 10 AT 8PM/7C
Narrated by WHOOPI GOLDBERG With ANGELA BASSETT, DON CHEADLE,
OSSIE DAVIS, RUBY DEE, SAMUEL L. JACKSON, VANESSA L. WILLIAMS and others
www.hbo.com/unchained
HBO
Hardcover companion book, DVD/VHS available in stores in February.


Laurel Burch
Oakland
tax plan sparks party
THREE MORE SLAYING

Sports
Royal rout in Oakla


Hate crimes will be punished.
Up to $25,000 penalty per incident.
Violence, threats or intimidation against
anyone because of their actual or perceived
race, color, religion, ancestry,
national origin, age, disability,
gender or sexual orientation
IS ILLEGAL.
(California Civil Code Sections 52 and 52.1)
If you have witnessed or been the victim of a hate crime:
866-4-NO-HATE
866-466-4283
HIB


ue military
ome up with
a classic quote!
In a recent interview, General Norman Schwartzkof was asked if he thought there was room for forgiveness toward the people who have harboured and abetted the terrorists who perpetrated the 9/11 attacks on America.
His answer:
"I believe that forgiving them is God's function. Our job is simply to arrange the meeting."
11/22

Rederford, Regina

From: Announcements
Sent: Wednesday, November 06, 2002 2:52 PM
To: Announcements
Subject: City of Oakland Gay-Straight Employee Alliance - Founding Meeting

all are invited to join us in the founding, establishing, conceiving and planning for
the City of Oakland Gay-Straight Employee Alliance

OUR FIRST MEETING WILL BE HELD ON THURSDAY, NOVEMBER 14th AT 5 p.m.
CITY HALL- HEARING ROOM 3

Pizza and drinks will be available

Exhibit 67
000610 76a

From: Announcements
Sent: Friday, November 15, 2002 11:39 AM
To: Announcements
Subject: City of Oakland Gay-Straight Employee Alliance/Candlelight Vigil for Peace and Tolerance

After an organizing meeting, the City of Oakland Gay-Straight Employee Alliance is pleased to announce its formation. Its purpose (yet to be formalized) will generally be to provide a interactive forum for employees who identify as and/or support gay/lesbian workers as an integral part of the City of Oakland work force. You are invited to future events of the Alliance, including a holiday luncheon in December. Please watch out for announcements.

The Alliance would also like to direct City Associates' attention to the following worthwhile event:

ENLIGHTEN EAST BAY CANDLELIGHT VIGIL FOR PEACE & TOLERANCE
FRIDAY NOVEMBER 15, 5-8PM
OGAWA PLAZA/OAKLAND CITY HALL

Inspirational speakers and music will take place in the amphitheatre directly in front of Oakland City Hall where candelarias representing the 25 transgender Americans murdered so far this year, a cascading rainbow of electric lights representing community pride, and searchlights streaking towards heaven representing all victims of hate crimes will provide a
beautiful setting for the event.

The purpose of the event is to provide an opportunity for the public to express it's rejection of hate speech and bigotry in a peaceful, non-confrontation way as well as provide an opportunity for local leaders to express their commitment to creating a more just and civil society.

The vigil takes place in the context of the brutal hate-crime murder of a transgender 17 year-old, Eddie (Gwen) Araujo in Newark, CA. Also Oakland's Bishop O'Dowd High School is presenting "The Laramie Project", portraying the killing of Matthew Shepard, a gay youth.

The Alliance urges you to attend.

From: Announcements
Sent: Wednesday, December 04, 2002 3:25 PM
To: Announcements
Subject: Gay-Straight Employee Alliance Holiday Mixer

City and Port of Oakland
Gay-Straight Employee Alliance

First Annual Holiday Mixer

Join Honorary Host Council Member Danny Wan
for an evening of food, fun and camaraderie

Wednesday, December 18, 2002
5:30 to 8:00 p.m.

Washington Inn
495 10th Street at Washington

Delicious Hors d'oeuvres will be Served

Please bring an unwrapped toy
for the Mayor's Holiday Toy Drive

NO HOST BAR

From: Wan, Danny
Sent: Friday, October 11, 2002 2:52 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

I would gaily join in celebrating National Coming Out Day. Count me in as part of the "knowing each other network".

Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

Rederford, Regina

From: Williams, Carol
Sent: Monday, October 14, 2002 9:22 AM
To: Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

True this is a diverse city, so if what you are saying is correct then all of our religious organizations should be able to solicit city employees according to their beliefs, traditions and practices.

CWC

-----Original Message-----
From: Wan, Danny
Sent: Friday, October 11, 2002 6:19 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon' 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

It is my understanding that part of the City's business is to celebrate diversity among City employees. Therefore, we do often get announcements of celebration of various cultures and celebration days. National Coming Out Day is a day of celebration of the Gay/Lesbian culture and movement. We should indeed celebrate as part of the City's business.

Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

According to Administrative Instruction #0140, e-mail should only be used for City business, this is not city business

-----Original Message-----
From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well -- what a great idea --- count me in and happy coming out day to all as well. Thanks for making the leap. Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

000614

80a

Christy, Robin

From: Williams, Carol
Sent: Monday, October 14, 2002 9:32 AM
To: Vose, Charles; Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

It was not religious, but we are not talking about religion per say we are talking about diversity.

-----Original Message-----
From: Vose, Charles
Sent: Monday, October 14, 2002 9:26 AM
To: Williams, Carol; Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

I don't believe this was a RELIGIOUS announcement, but instead an announcement that is similar to ones numerous other groups in the city send out routinely (as others have already pointed out). It is interesting that it was THIS one over which this issue was raised.

Charles Vose

-----Original Message-----
From: Williams, Carol
Sent: Monday, October 14, 2002 9:22 AM
To: Wan, Danny; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

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CWC

-----Original Message-----
From: Wan, Danny
Sent: Friday, October 11, 2002 6:19 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

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Danny Wan
Oakland City Councilmember for
District 2
238-7002

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Christy, Robin

From: Ojukwu, Odili
Sent: Monday, October 14, 2002 9:31 AM
To: Nguyen, Alex; Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

The interesting thing here is not whether this is the first or the umpteenth time AI #0140 is cited but the appropriateness of use of the city e-mail system.

-----Original Message-----
From: Nguyen, Alex
Sent: Monday, October 14, 2002 9:16 AM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

This is interesting. I have seen many, many such celebration announcements come across the city e-mail system, and this is the FIRST time anyone has ever claimed AI #0140 ! ! !

-----Original Message-----
From: Williams, Carol
Sent: Friday, October 11, 2002 5:53 PM
To: Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

According to Administrative Instruction #0140, e-mail should only be used for City business, this is not city business

-----Original Message-----
From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well — what a great idea — count me in and happy coming out day to all as well. Thanks for making the leap. Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

000616

82a

From: Cappio, Claudia
Sent: Friday, October 11, 2002 5:29 PM
To: Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Detra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mel'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Well --- what a great idea --- count me in and happy coming out day to all as well. Thanks for making the leap.
Regards, Claudia

-----Original Message-----
From: Announcements
Sent: Friday, October 11, 2002 1:22 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mel; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Happy National Coming Out Day

HAPPY NATIONAL COMING OUT DAY

Dear City Staff:

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

I often hear that there are lots of gay workers in the City but I don't know that many. Perhaps you don't know that I am gay - I certainly participate in the silence. I would like to use National Coming Out Day to break that silence.

If anyone, gay or straight, would like to respond back to me or become part of a "knowing each other network", I would love to hear from you. I have attached the National Coming Out Day website.

<http://www.hrc.org/ncop/index.asp>

In unity,
Judith Silverman

BEST AVAILABLE COPY

85a

From: Parker, Robynn
Sent: Tuesday, October 15, 2002 4:28 PM
To: Rederford, Regina
Subject: FW: Happy National Coming Out Day

-----Original Message-----
From: Robinson, Deborah
Sent: Tuesday, October 15, 2002 4:18 PM
To: Parker, Robynn; ~~Williams, Carol~~
Subject: FW: Happy National Coming Out Day

anti Gay Prejudice

Deborah A. Robinson
City of Oakland
CEDA Building Services
250 Frank H. Ogawa Plaza, Rm. 2340
Oakland, CA 94612
(510) 238-4788
(510) 637-0396 (Fax)

-----Original Message-----
From: Nadel, Nancy
Sent: Tuesday, October 15, 2002 3:54 PM
Subject: RE: Happy National Coming Out Day

Dear Ms. Robinson,

As long as people are killed for their sexual identity (remember Laramie?), it is important that we assure gay and lesbian people their right to have pride in who they are, just as we recognize that right for women, children, people of different religions, people from other countries, and people of color. Years ago I had an employee who was beaten in the streets of Oakland for being gay. Children in Oakland schools are harassed for being gay. I understand that this is a difficult concept for some who feel the Bible teaches them that sexual identity as a gay or lesbian is wrong. The Bible also says "slaves obey your master" and "women obey your husbands." I personally think the good book needs some updating. Thirty-five years ago, I worked at Bellevue Psychiatric Hospital in New York City. At that time, people who identified as gay were considered mentally ill and their families could commit them to a mental hospital on those grounds. The psychiatric profession has since seen the light. I think it is time for the rest of the world to catch up.

There is a national day for those who accept Christ as their personal savior - it's called Christmas and it's a city, national and worldwide holiday. Those of us who are not Christian are forced to observe it. We cannot take excused time off instead for our own holidays. There is frequent reference to Christmas in city emails. I just received one this week about a choir. Frequently a minister comes and prays at open forum of city council meetings, mentioning Jesus' name. OCO members come to have meetings with me in city hall starting and ending their meetings with a Christian prayer despite my not being Christian. I live with it. I respect the religion of others.

People who are gay and lesbian in this city and specifically in this city government have told me they feel threatened and unsafe for being who they are. It is not a choice, it is who they are. That kind of environment at the workplace, in our city is unacceptable to me as an individual and to the city - it is counter to our non-discrimination policy. National Coming Out Day clearly has brought some light on anti-gay prejudice in this city and city government. We all owe ur colleagues the right to feel pride in themselves if they are gay, to be able to identify publicly if it makes them feel less ghtened about being who they are - that's step one for local selflessness. It takes nothing away from the tragedies

around the world but instead points to the importance of stopping prejudice everywhere, early, no matter where it is, no matter whom it is against.

Sincerely,

Nancy Nadel

-----Original Message-----
From: Robinson, Deborah
Sent: Tuesday, October 15, 2002 2:50 PM
To: Nadel, Nancy; Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Debra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

What is the value in sharing this information with everyone? Most people in general don't base relationships on that one particular subject. There are just some things that are not as important as you may think to all.

When children, men and women are killed daily in this world, most of the time your sexuality has no bearing. Take for instance the sniper in the Washington D.C. area. Now, if the sniper were targeting gays or heterosexuals, would you be so ready to release information to everyone? Is it really needed information? I don't know you personally, and if I didn't I promise you your sexuality would not be a criteria used in judging you as a person. I may use the measuring stick of character and integrity. How about a National Integrity and Good Character Day. And guess what neither requires the knowledge of your personal sexual his - story.

What happens in the privacy of your home or wherever, is between you and those involved.
This e-mail just made me wonder why so much attention is needed pertaining to this particular subject?
Your sexuality and religion (just to name a few) are your own business and does nothing at all for most.

Is being STRAIGHT something that is advertised by parades and parties? Those who except Christ as their personal Savior, should there be a National Day for that as well? No, it's your business. Some things need not to be shared with EVERYONE

I wouldn't mine hearing or reading about your edifying or lifting one up when a kind word or encouragement is needed, or giving of yourself in ways that are meaningful during this period in our lives, now that would be worth sharing. Lets not be so self-centered and self involved and try some self - less -ness.

Deborah A. Robinson
City of Oakland

-----Original Message-----
From: Nadel, Nancy
Sent: Friday, October 11, 2002 6:12 PM
To: Williams, Carol; Cappio, Claudia; Silverman, Judith; DL - Citywide; 'Cecilia Smock'; 'Cheryl Wallace-Stanley'; 'Deborah Acosta'; 'Debra Cooley'; 'Gregory C. Garrett'; 'John Quintal'; 'Lisa Talley Brown'; 'Chan, Mei'; 'Easley, Countess'; 'Jackson, Sharon'; 'Monetta, John'; 'Petersen, Patricia'; 'Sullivan, Margaret'
Subject: RE: Happy National Coming Out Day

Dear Carol,

While I am not gay and I appreciate your admonition, I believe it is also a policy of the city not to discriminate on the basis of sexual identity. Understanding people's sexual identity is the first step to becoming sensitive enough to not discriminate. Respecting ourselves and our colleagues is very much city business.

Nancy Nadel

-----Original Message-----

C00621 868

Christy, Robin

From: Announcements
Sent: Monday, October 14, 2002 12:55 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Amigos "Dia de los Muertos" Altar Exhibition

Amigos, the City of Oakland Chicano/Latino Employees Association, invites you to participate and view the "Dia de los Muertos" Altar Exhibition located in the lobby of 250 Frank Ogawa Plaza from October 21-November 1, 2002. The community altar is made of up of photos, visual representations and memorial information of friends, co-workers, and family members who have passed away. A separate altar will also focus on Oakland police officers who have died in service to the community. A reception will be held at the same location on October 24, 2002 from 4:30 p.m.-5:30 p.m. For more information please contact Juanita Meza Velasquez at (510) 238-6680 or jmvelasquez@oaklandnet.com <mailto:jmvelasquez@oaklandnet.com>.

Christy, Robin

From: Announcements
Sent: Thursday, October 10, 2002 3:27 PM
To: DL - Citywide; Cecilia Smock; Cheryl Wallace-Stanley; Deborah Acosta; Detra Cooley; Gregory C. Garrett; John Quintal; Lisa Talley Brown; Chan, Mei; Easley, Countess; Jackson, Sharon; Monetta, John; Petersen, Patricia; Sullivan, Margaret
Subject: Free Lunchtime Dance Concert Celebrating Oakland History

Nina Haft & Company Presents:
EVERYONE THEN COMES SOMETIME: A Free Lunchtime Dance Concert Celebrating Oakland History

Please join us on this Friday, October 11th for a free outdoor dance concert celebrating 150 years of Jewish history and culture in downtown Oakland. This short program of dances by Oakland-based Nina Haft & Company is inspired by subjects ranging from casino racketeering to Oakland author Gertrude Stein's essays about world war.

The concert takes place on Friday, October 11th, 2002 at 12:15pm in the Oakland City Hall Amphitheater at 1 Frank H. Ogawa Plaza, near the corner of 14th Street and Broadway.

Everyone Then Comes Sometime is an official event of "Celebrating 150 Years of Oakland," and is co-sponsored by the City of Oakland Community and Economic Development Agency and the Craft & Cultural Arts Department.

Grab your lunch and enjoy the dance!

000623
88a

Rederford, Regina

From: Announcements
Sent: Tuesday, March 25, 2003 4:39 PM
To: Announcements
Subject: Teach-in on the War with Iraq

TO: Friends
FROM: Oakland City Councilmember Jane Brunner
RE: Iraq Teach-In in Oakland

Oakland City Councilmember Jane Brunner invites you to a teach-in on the war on Iraq and the implications for the Middle East, to be held Monday, March 31st at 7:00pm in the Oakland City Council Chambers at Oakland City Hall. This is the first anti-Iraq War teach-in sponsored by a city government anywhere in the U.S.

Councilmember Brunner will moderate a panel of experts to discuss the circumstances leading up to the conflict with Iraq and to explore the ramifications of war for the people of Iraq, the Middle East and for Americans here at home.

Why are we so deeply involved in Iraq and how did we get there? How is the war in Iraq related to the broader situation in the Middle East? How will the cost of the war be felt here at home? These and many other questions will be explored by the assembled panel:

Rev. Dr. Vernon Burroughs, St Paul's African Methodist Episcopal Church, Berkeley, CA

Reese Erlich, Foreign Correspondent and Author of "Target Iraq: What the News Media Didn't Tell You"

Marcia Freedman, Former Member of the Israeli Knesset; President, Jewish Alliance for Justice and Peace

Favianna Rodriguez, political artist, youth organizer and Founder, East Side Arts Alliance, Oakland

Robert Scheer, Syndicated Political Columnist (*LA Times*, *SF Chronicle*, *The Nation* magazine)

Stephen Zunes, Associate Professor and Coordinator of the Peace and Justice Studies Program, University of San Francisco

Please join Councilmember Brunner, Council President Ignacio de la Fuente and Mayor Jerry Brown in supporting this teach-in and calling for an evening of discussion on the war in Iraq.

If you have any questions or would like any further information, please contact Councilmember Brunner's office at 238-7001.

City Hall is located a half-a-block below Broadway on 14th Street in downtown Oakland.